Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

MARIS DISTRIBUTING COMPANY,

Petitioner,

v.

ANHEUSER-BUSCH, INC.

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED FOR REVIEW

Question 1: Is a party who controls output, prices, entry, and exit in a relevant market and submarket insulated from a finding of market power because the control is exercised pursuant to hundreds of vertical contracts?

Question 2: When a manufacturer and the owners of all distributors that distribute the manufacturer's product agree that the manufacturer will control the sales of ownership interests in the distributorships, are the market shares of all parties to that agreement (or conspiracy) aggregated in determining whether the manufacturer has market power in the market for distributorships?

Question 3: When a manufacturer ties the sale of its product to distributors to an agreement giving the manufacturer control over the sale of any interest in the distributors, does the tying arrangement transfer the manufacturer's market power in the product market to the market for distributorship interests?

PARTIES TO THE PROCEEDING BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the Court whose judgment is sought to be reviewed are:

1. Maris Distributing Company

2. Anheuser-Busch, Inc.

3. Anheuser-Busch Companies, Inc.

Maris Distributing Company is a Florida corporation owned by family members and a family trust of the Maris family and there are no parent corporations, and no publicly held company owns any corporate stock therein.

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CITATION TO REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The opinion and Judgment sought to be reviewed is reported as: *Maris Distributing Company v. Anheuser Busch, Inc.*, 302 F.3d. 1207 (11th Cir. 2002)

JURISDICTIONAL STATEMENT

The Judgment sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on August 19, 2002, and this Petition is timely filed within 90 days thereof. This Court has jurisdiction to review on a Writ of Certiorari the Judgment of the Eleventh Circuit pursuant to 28 U.S.C. §1254(1)

STATUTES INVOLVED IN CASE

15 U.S.C. § 1 (2002) – Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF CASE

1. Procedural History

Maris Distributing Company ("MARIS") filed this lawsuit against Anheuser-Busch, Inc. ("BUSCH") on January 22, 1997, in the United States District Court for the Middle District of Florida. MARIS, a distributor of BUSCH products, claimed that a provision of BUSCH's distributorship contract prohibiting any distributor from "being owned in whole or in part, directly or indirectly, by the public" was an unreasonable restraint of trade which violated 15 U.S.C. §1 ("Sherman Act"). MARIS identified a relevant market for equity interests in beer distributorships and a submarket for equity interests in beer distributorships that distributed BUSCH products.

The trial court, and the Eleventh Circuit Court of Appeals, noted that in order to prevail, MARIS had to prove *either* 1) that BUSCH had market power in the relevant market or submarket and that the public ownership prohibition had *potential* anticompetitive effects or 2) that the public ownership prohibition resulted in *actual* anticompetitive effects in the relevant market or submarket. Much of the trial concerned the existence of the claimed relevant market and submarket. The jury found that there was a relevant market for equity interests in beer distributorships and a relevant submarket for equity interests in BUSCH beer distributorships.

The trial court submitted to the jury only the question of whether the public ownership prohibition resulted in *actual* anticompetitive effects. The jury found against MARIS. The trial court ruled that BUSCH's power to control the relevant market and submarket was grounded in BUSCH's actions ostensibly enforcing its

approximately 700 distributorship agreements and that this "contract power" could not be used as a measure of market power. Accordingly, the trial court entered a directed verdict for BUSCH on the issue of market power and the jury was prevented from deciding whether MARIS had demonstrated that the public ownership prohibition had *potential* anticompetitive effects. The Eleventh Circuit affirmed the trial court's ruling. This case concerns the proper factors to consider in determining BUSCH's market power in the relevant market and submarket.

2. Maris' Background

MARIS started its business in 1968, and for 29 years was an exclusive BUSCH distributor in an eight county area of Florida which encompassed Gainesville and Ocala. In the late 1960s, August Busch, II had promised Roger Maris and his brother Rudy Maris an opportunity to buy a BUSCH distributorship if Roger Maris would postpone his retirement from baseball and play an additional season for the Busch owned St. Louis Cardinals. Roger Maris played an extra year of baseball, and he and his brother Rudy moved their families to Florida and acquired BUSCH distribution rights. After they had purchased the facilities of the prior distributor and after the Maris families had relocated to Florida, BUSCH amended its distributorship agreements with all distributors by adding the public ownership prohibition.

In 1996, BUSCH threatened MARIS with termination as a BUSCH distributor unless MARIS agreed to sell the distributorship to BUSCH. MARIS refused and attempted to sell to third parties. BUSCH offered to suspend the termination procedures if MARIS agreed to discuss a sale exclusively with BUSCH. MARIS refused. On March 20,

1997, BUSCH terminated MARIS's distributorship without compensation to MARIS and then sold the distribution rights to neighboring distributors.[1]

3. The Equity Agreement

BUSCH is the dominant American beer brewer. It distributes its beer domestically through approximately seven hundred distributors. A majority of states' laws prevent brewers from owning beer distributors except on a temporary basis or as a limited partner. These post-prohibition era laws are intended to preserve the independence of beer distributors.

BUSCH's distributorship agreement, called the Equity Agreement, vests distributors with the right to sell or bequeath exclusive distribution rights to BUSCH products. All BUSCH distributors have the same Equity Agreement. BUSCH may terminate a particular distributor's Equity Agreement only for cause related to the distributor's performance. BUSCH may simultaneously terminate all equity agreements without cause, a procedure routinely used when BUSCH modifies the agreements — all agreements are terminated and distributors may either sign an amended agreement or lose all equity and distribute on an at will basis.

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[1] The last full year of MARIS' operation was its best year ever. MARIS had increased its sales from under 3 million in 1968 to over 50 million in 1996. During its last 10 years, MARIS nearly doubled its sales, becoming one of the largest (top 10%) beer distributors in the United States. At the time of termination, MARIS had a BUSCH market share of over 60% which was above both the Florida (55%) and national (45%) averages for all other BUSCH distributors.

4. The Public Ownership Prohibition

Prior to 1968, BUSCH distributors had no contractual rights to build, sell, or bequeath equity in BUSCH distribution rights. BUSCH introduced its Equity Agreement in 1968 and intentionally fostered a market for distributorships by agreeing that distributors could build and sell equity in BUSCH distribution rights. This was done to encourage investments in distributorships and maximize beer sales.

In 1969, one of BUSCH's largest distributors began planning an initial public offering. BUSCH responded by terminating all-equity agreements and circulating an amended agreement which prevented ownership of a distributor "by the public." The Equity Agreement has always required BUSCH's approval of any distributorship buyer, but that approval may not be unreasonably withheld. The public ownership prohibition was absolute and not subject to a "reasonableness" requirement. All distributors signed the amended agreements.

In 1971, BUSCH commissioned two studies of its public ownership prohibition. A study conducted by Dillon-Reed concluded that public ownership was feasible for a large BUSCH distributor and that public ownership would yield a substantially higher value (60%) for the distributorship's stock. A detailed report by Professor Goodman of the Wharton School noted that the prohibition "does not seem to provide benefits commensurate with the irritation which is engendered among wholesalers." Professor Goodman concluded that the prohibition had no legitimate economic justification other than allowing a large brewer to control much smaller distributors in matters beyond BUSCH's legitimate concerns regarding

the manner its beer is distributed. Contemporaneous internal BUSCH documents listing the pros and cons of public ownership listed as cons "wholesaler combines creating power blocks," reduction in "Anheuser-Busch influence," and that publicly owned distributors would be "more difficult to terminate."

In 1982, a public company acquired some stock in one of the largest BUSCH distributors and made a tender offer for additional stock. BUSCH threatened termination based on the public ownership prohibition and, after litigation between the distributor and tender offeror, the distributor's stock was returned to private ownership. That distributorship continues to have hundreds of owners, including educational institutions, but its stock is not publicly traded.

In 1996, a BUSCH distributor requested deletion of the Equity Agreement's public ownership prohibition so that he could obtain public financing to acquire additional distributors. It was not deleted.

In 1995, BUSCH threatened the Hawaii distributorship with termination and simultaneously made an offer to acquire it. The distributor sold to BUSCH. BUSCH's Vice President of Sales admitted that, due to the high cost of the distributorship, it was fortunate that BUSCH purchased it because there were not many private parties with "that much money."

Bruce Sandison, a BUSCH Vice President who heads a department charged with responsibility for appraising distributorships, admitted that "the lack of liquidity alone for privately held companies in general would cause those [BUSCH distributorships] to trade at levels–price levels

that are at a discount to companies traded on normal stock exchanges." An analyst working in Mr. Sandison's department testified that it was known within that department that buyers were generally willing to pay more for distributorships than the prices BUSCH would approve. When BUSCH lobbied the Maine and Connecticut legislatures to allow BUSCH to own limited partnership interests in beer distributorships, BUSCH argued that allowing it to enter the market for beer distributorships would "widen the pool of potential buyers and the greater demand means higher market value." In January 1999, BUSCH published a Consolidation Guide encouraging distributors to sell to BUSCH because BUSCH could provide a benefit no other buyer could provide—a tax free exchange of distributorship stock for the stock in a "publicly traded" corporation (i.e., BUSCH).

In 1994 to 1995, BUSCH conducted an analysis of its distribution system. BUSCH concluded that extensive consolidation had to occur to realize efficiencies and remain competitive. BUSCH's analysts concluded that the "current rate" of consolidation was less than one percent, but could be increased to over fifty percent with "financial incentives." The only financial incentive identified was "public ownership." BUSCH rejected that incentive.

BUSCH's analysts next generated a detailed written plan identifying a different "incentive" for consolidation. That incentive was "heavy crew pressure." A "crew" refers to a group of BUSCH employees ostensibly evaluating a distributorship to determine whether the equity agreement should be terminated. Threatening distributors with termination replaced the proposed "public ownership" as the "incentive" for distributors to sell and

trigger consolidation.[2]

BUSCH's plan targeted MARIS and others for consolidation. It even identified the distributor that would replace MARIS and consolidate the territory. The plan was implemented. BUSCH threatened MARIS with termination and simultaneously made an inadequate purchase offer for the distributorship.[3] MARIS rejected BUSCH's offer and attempted to sell to third parties, but its market value was depressed by the public ownership prohibition and the fire sale atmosphere BUSCH had created. One potential buyer abandoned discussions when BUSCH told him that they "had other plans" for MARIS. MARIS filed this antitrust action to enjoin enforcement of the public ownership prohibition, and was subsequently terminated. MARIS then sought antitrust damages measured as (treble) the difference in the value of its distributorship with and without the public ownership prohibition.

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[2] This plan was excluded as evidence because it dealt with MARIS' contention that BUSCH's termination of MARIS' distributorship breached the equity agreement.

[3] MARIS was prevented from showing at trial that BUSCH's termination threat was made in bad faith and that there was no basis to terminate or threaten termination of MARIS's Equity Agreement. This plan was excluded as evidence because it dealt with MARIS' contention that BUSCH's termination of MARIS' distributorship breached the Equity Agreement. The breach of contract case between MARIS and BUSCH was pending in state court at the time of the antitrust trial and the jury was instructed that the contractual propriety of MARIS' termination would be decided in another proceeding. The state court jury ultimately determined 1) that MARIS had complied with the Equity Agreement and was wrongfully terminated, 2) that BUSCH violated the Equity Agreement when it terminated MARIS, and 3) that BUSCH acted unfairly and in bad faith.

5. MARIS Established a Strong Potential for Anticompetitive Effects from the Public Ownership Prohibition

MARIS' economists addressed the anticompetitive effects of the public ownership prohibition by explaining that the prohibition was interfering with free market forces by preventing publicly owned "consolidation" or "roll-up" companies from forming to acquire and consolidate distributors. They detailed how public companies initially consolidated the manufacturing sector at the turn of the 20th century and then began consolidating much of the retail sector in the middle part of the century. Public companies, where allowed, are now in the process of consolidating the distribution sector. Most recently, public consolidation occurred with soft drink bottlers.

Utilizing economic models from these earlier experiences, experts explained how public "roll-up" companies would be able to pay premiums for beer distributors and, by consolidating distributorships, render more cost effective services and assert downward pressure on the retail price of beer. The experts relied on BUSCH's own documents recognizing that public ownership would cause existing distributors to sell and exit the market (i.e., increase output), increasing the consolidation rate.

The anti-competitive effects of the public ownership prohibition are 1) not allowing competitive market forces to introduce public ownership into beer distribution, 2) preventing market forces from establishing the price of distributors and maintaining an artificially low price[4] by

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[4] In *Sullivan v. NFL*, 34 F.3d. 1091 (1st Cir. 1994), the court upheld the anticompetitive nature of a public ownership prohibition of NFL football teams that depressed team sales prices. Rejecting the

excluding public companies from the relevant market and submarket, 3) reducing the number of distributorship sales (output) as distributors preferred to realize the greater value of ongoing business profits than selling at inadequate prices, 4) preventing the efficiencies of consolidation from reaching the beer distribution industry, 5) allowing BUSCH to exert price and other pressures exclusively on a system of smaller family owned distributors and avoiding the negotiation pressures which would be created by large publicly owned distributors, and 6) preventing large public distributors from exerting downward pressure on the price of beer through negotiations with BUSCH and, coupled with the efficiencies of consolidation, passing on some of these savings to consumers.[5]

The anti-competitive effects of the public ownership prohibition were premised on public consolidators entering the relevant market. When the trial court ruled that BUSCH's market power had not been shown, MARIS' only means of prevailing was to show that the anti-competitive effects were actual and not merely potential. This created a classic "chicken or egg" dilemma. MARIS had to show that the public ownership prohibition was actually excluding public consolidators. Public consolidators for beer distributors do not presently exist,

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argument that competitive injury must result in higher and not lower prices in the relevant market for NFL teams, *Sullivan* stressed that "the Supreme Court has emphasized...that overall consumer preferences in setting output and prices is more important than higher prices and lower output per se, in determining whether there has been an injury to competition." *Id.* at 1101.

[5] BUSCH established the prices at which beer would be sold to distributors without negotiation and directed distributors regarding the prices to charge retailers.

however, because the public ownership prohibition precludes this method of consolidation. This left MARIS with anticompetitive effects that were characterized as potential, and MARIS had to make an additional showing of BUSCH's market power.[6]

6. The Market Power Issue

MARIS established BUSCH's market power through various means. First, MARIS maintained that BUSCH, as the largest domestic consumer of beer distribution services, enjoyed monopsony power - over distributors furnishing the services. That is, that BUSCH was able to control beer distributors dependent for economic survival upon BUSCH utilizing their distribution services. Among the matters BUSCH controls in this fashion are the identity of owners, buyers and sellers of distributors, the sale price of distributors, and beer prices. This power also enables BUSCH to dictate, without meaningful negotiation, the terms of distributor contracts memorializing BUSCH's pre-existing power.

BUSCH exercises absolute control over the sale of distributors that distribute BUSCH products. BUSCH intentionally maintains less than fair market value prices for its distributorships through the use and abuse of its contractual price approval rights. BUSCH maintains a list

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[6] *Sullivan*, *supra*, recognized the dilemma of proving actual anticompetitive effects when a public ownership prohibition bars public companies from even beginning to compete for ownership interests. "It would be difficult indeed," *Sullivan* reasoned, "to provide direct evidence of competition when the NFL effectively prohibits it." *Id.* at 1100. Accordingly, *Sullivan* noted the "significance of potential competition, especially when challenged policy limits such competition so that it is not evident in practice." *Id.*

of pre-approved owners of distributorships and forces existing distributors to sell by threatening equity agreement terminations. BUSCH repeatedly discourages some potential buyers from bidding on distributorships by telling them that "whenever an ownership change in a wholesaler does take place, we initially look to the current Anheuser-Busch wholesaler family to allow them the opportunity to upgrade to a larger market or expand their existing area of responsibility [and that] we look at our wholesaler employees and our own Anheuser-Busch personnel as potential candidates." So absolute is BUSCH's right to control price, output, entry, and exit into the market that in 1992 it presented to Mercantile Bank a "coordinated plan" for managing the purchase and sale of BUSCH beer distributors. A result of BUSCH's control over distributorship sales is that, over the prior decade, most distributors that include BUSCH products in their portfolios which changed hands were sold to BUSCH insiders and related parties at less than fair market value.

The economic basis of BUSCH's power in the relevant market and submarket is its role as the dominant American brewer. In 1996, BUSCH had a national market share of 48%, with upward trends and a goal of 60%. BUSCH distributors distributed 55% of all beer distributed domestically, accounting for an even greater majority of all beer revenues. This dominant position allowed BUSCH to control the market for distributors which distribute a majority of beer consumed domestically.[7]

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[7] MARIS did not contend that manufacturer approval of distributorship sales is anticompetitive. Manufacturers have legitimate reasons for approving a distributorship sale to insure proper distribution of its products. MARIS challenged as anticompetitive only BUSCH's absolute prohibition of all forms of public ownership.

7. The Eleventh Circuit Ruling

The Eleventh Circuit viewed BUSCH's right to control output, prices, exit, and entry in the relevant market and submarket as an exercise of "contract power." This is because the Equity Agreements gave BUSCH the right to approve buyers and sale prices. Distinguishing an exercise of "contract power" from "market power," the Eleventh Circuit held that BUSCH's control of the relevant market and submarket could not be relied upon to show BUSCH's market power.[8]

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[8] The Eleventh Circuit's rejection of "contract power" from consideration in market power determinations is not supported by other circuits; instead, the Eleventh Circuit relied on a misapprehension of the case law. Citing opinions from the Second, Third, Fifth, and Eighth Circuits, the Eleventh Circuit claimed to follow those "sister circuits [which] have cautioned against placing too much weight on the existence of contract power when determining relevant markets and *determining whether defendants possess market power*." *See* 237 F.3d. 81 (2nd Cir. 2000); 124 F.3d. 430 (3rd Cir. 1997); *United Farmers' Agents Assoc., Inc. v. Farmers Ins. Exchange*, 89 F.3d. 233 (5th Cir. 1996); *DD Spotting Serv., Inc. v. Supervalu, Inc.*, 136 F.3d. 554 (8th Cir. 1998). Those cases merely rejected attempts to define a relevant market, not by the function or use of a product or by reference to actual consumer behavior (i.e., demand), but exclusively by reference to a contract identifying the products which a plaintiff must purchase. These cases held that contractual provisions controlling the sale and purchase of a group of products could not by themselves create a relevant market for those products. The cases presupposed, however, that if a relevant market for these products existed the contractual provisions controlling that market would be sufficient to establish market power. MARIS established the existence of a relevant market for beer distributors and submarket for BUSCH distributors by the traditional tests of *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as well as expert testimony regarding cross elasticity of demand and substitutability. MARIS did not attempt to establish a relevant market or submarket by reference to a contract.

Turning its attention to BUSCH's position as the dominant brewer, the Eleventh Circuit dismissed consideration of BUSCH's market share in beer as indicative of market power, reasoning that the relevant market was for beer distributorships and not beer. Since BUSCH owned less than 3% of its beer distributors, the Eleventh Circuit concluded that BUSCH did not have market power.

The Eleventh Circuit refused to aggregate the market shares of all parties to the agreement in question to more accurately measure the market power of the "combination" (i.e., BUSCH and 700 distributors) that funneled control of the relevant market and submarket to BUSCH. Such aggregation of market share would have yielded a one hundred percent (100%) monopoly share in the relevant submarket and a fifty-five (55%) share in the relevant market.

BASIS FOR JURISDICTION IN COURT OF FIRST INSTANCE

The United States District Court for the Middle District of Florida had Federal Question jurisdiction over this antitrust case under 28 U.S.C. § 1331, and the United States Court of Appeals for the Eleventh Circuit had jurisdiction over this appeal under 28 U.S.C. § 1291.

ARGUMENT

1. The Eleventh Circuit Failed to Follow this Court's Precedent

In *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), this Court considered whether

Kodak had market power in a market for replacement *parts* for Kodak photocopiers and micrographic equipment. Kodak manufactured only some replacement parts, and the rest were manufactured by OEMs. *Id.* at 457. Replacement parts also were available from brokers who purchased parts from Kodak or stripped used Kodak equipment for useful parts. *Id.* at 458 n. 2. In determining whether the evidence supported an inference of market power in the *parts* market, this Court noted that "Kodak has control over the availability of parts it does not manufacture" and that "Kodak has prohibited independent manufacturers from selling Kodak parts..., pressured Kodak equipment owners and independent parts distributors to deny the purchase of Kodak parts, and has taken steps to restrict the availability of used machines." *Id.* at 464. In evaluating the showing of Kodak's market power, this Court did not concern itself with the percentage of parts actually manufactured, owned, or sold by Kodak. On the basis of Kodak's *control* over the availability and sale of parts, a control grounded in what the Eleventh Circuit calls "contract power," this Court concluded that the record supported the inference of market power, with the final decision to be made by a jury upon the presentation of all relevant evidence. *Kodak* offered this guidance for market power determinations:

> "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the particular facts disclosed by the record. In determining the existence of market power... this court has examined

> closely the economic reality of the market at issue." *Id.* at 467 (citations omitted)

Much of Kodak's power in the parts market was contractual. Indeed, this Court observed that the basis of Kodak's control over OEM manufactured parts was that "Kodak and the OEMs **agreed** that the OEM's would not sell parts that fit Kodak equipment to anyone other than Kodak." *Id.* at 458. This Court characterized the level of market power created by these agreements as a "monopoly share of the relevant parts market." *Id.* at 465. According to the Eleventh Circuit's ruling in MARIS, these agreements would have been characterized as "contract power" denying any inference of market power.[9] The "economic reality" is that, through agreements and coercion, BUSCH has control of the relevant market. The sources of that control are irrelevant.

2. The Circuits are Split on the Role of Contracts In Market Power Determinations

The Eleventh Circuit opinion here conflicts with *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d. 660 (6th Cir. 1993). In that case, the defendant obtained a license from Ford Motor Company for exclusive distribution of graphic design software. Ford required designers to utilize this software to do business with Ford. The defendant sold software support for this

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[9] The Eleventh Circuit correctly notes that some facets of the *Kodak* opinion are not applicable to this case. The entire foundation of *Kodak*, however, was that Kodak's *control* over the sale of replacement *parts*, a control achieved by contracts and "pressure," "would be sufficient to entitle respondents to a trial on their claim of market power." *Id.* at 465.

design software to designers, but only if they also purchased hardware maintenance. The plaintiff, who unsuccessfully attempted to enter into hardware maintenance contracts with the designers, claimed that "by conditioning the purchase of software support required by Ford to hardware maintenance," the defendant had violated Section I of the Sherman Act.

The Sixth Circuit stressed that this Court's decision in *Kodak* was dispositive. In *Kodak*, this Court described a tying arrangement as "an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Kodak* stressed that the tying arrangement violated the Sherman Act if the seller has market power "in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market."[10] *Kodak, supra* at 462.

Following *Kodak*, the Sixth Circuit in *Virtual Maintenance* found that the defendant had market power in the market for software support "because of its exclusive distribution license from Ford...."[11] An exclusive

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[10] Following this aspect of *Kodak*, BUSCH's conditioning the sale of its beer (a market in which BUSCH has market power) upon distributors agreeing to exclude public companies from the market for distributorships (a different market) was an illegal tying arrangement. Pursuant to this tying arrangement, BUSCH projected its market power in beer to create potential anticompetitive effects in the distributorship market.

[11] *Virtual Maintenance* even used the terms "exercise control" and "market power" interchangeably. Similarly, *Kodak* used the terms "economic power" and "market power" synonymously.

"distribution license" is-a contract that gave the defendant the right to prevent others from dealing in the product in question. The Eleventh Circuit's contract power doctrine would have precluded a finding of market power in *Virtual Maintenance.*[12]

3. The Circuits are Split on Whether the Market Shares of all Parties to an Agreement or Conspiracy in Restraint of Trade Should Be Aggregated to Determine Market Share

The Eleventh Circuit's methodology for calculating BUSCH's market share created an additional split between Circuits. The Eleventh Circuit insisted upon gauging BUSCH's market power exclusively by measuring BUSCH's market share in the relevant market for beer distributorships and submarket for BUSCH distributorships. The parties who had agreed with BUSCH

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[12] The Eleventh Circuit quoted and relied heavily upon the Third Circuit Court of Appeal's decision in *Queen City Pizza, Inc. v. Dominoes Pizza, Inc.*, 124 F.3d. 430 (3rd Cir. 1997), and claimed to have followed *Queen City Pizza* in distinguishing "between contract power and market power." Judge Lay, in his lengthy dissent in *Queen City Pizza*, noted that the Third Circuit is in conflict with *Virtual Maintenance, supra,* as well as this Court's precedent in *Kodak.* Judge Lay stressed that the Sixth Circuit in *Virtual Maintenance, supra*, had properly followed *Kodak* by recognizing "the significance of [the] distribution license from Ford..." in its ability "to exercise control over the sale of software support." *Id.* at 448. The majority in *Queen City Pizza* had attempted to distinguish *Virtual Maintenance* by claiming that the software support was inherently unique and not interchangeable with other products. Judge Lay, quoting from *Virtual Maintenance*, stressed that the software products were not unique and that the market power or "control" originated in the distribution license and Ford's requirements. Market power in *Virtual Maintenance* originated in the contract.

to exclude public owners together had a market share of 100% in the relevant submarket (for BUSCH distributorships) and together owned distributors which sold a majority of beer (55% and increasing) distributed in the United States. Instead of utilizing these figures to calculate market share, the Eleventh Circuit counted only distributorships titled in the name of BUSCH and found that BUSCH's market share was an insignificant 2.9% in the relevant submarket and 1% in the relevant market.[13]

In *Spectators' Communication Network, Inc. v. Anheuser-Busch, Inc.*, 231 F.3d. 1005 (5th Cir. 2000), the Professional Golfers' Association (PGA) obtained agreements from a number of tournament sponsors, including BUSCH, that they would not allow the plaintiff broadcaster to conduct advertising activity at golf tournament sites. The trial court dismissed the suit against BUSCH, stressing that BUSCH had no market power in the market for golf tournament advertising. On appeal, the

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[13] The Eleventh Circuit methodology suffers from an initial infirmity in that all distributors are treated as equal in determining both the total number of distributors and the percentage of that number owned by BUSCH. A party may at its whim convert distribution rights in a large metropolitan area into either a single distributorship or divide up those rights among multiple corporate subsidiaries and create multiple distributorships. If market share determinations are made exclusively by reference to number of legal entities operating distributorships, an owner of an insignificant rural distributorship would be treated as having the same market share in the distributorship market as the owner of a large metropolitan distributorship. In calculating market share to measure market power, the important measure is percentage of distribution volume owned or controlled instead of the number of legal entities holding title to the rights to that distribution volume. Though BUSCH owns 2.9% of BUSCH distributors measured by number of legal entities, those distributors distribute 8% of all BUSCH beer. BUSCH's ability to combine all of its distributors into a single entity or multiply them into a hundred entities should be irrelevant in measuring market power.

Fifth Circuit reversed, finding that, though BUSCH alone had no market power, the PGA did have market power. Finding that in a suit against a particular conspirator, the market power of co-conspirators should be examined, the Fifth Circuit stressed that "the reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market." *Id.* at 1014.

Following *Spectators'*, the relevant market share in the submarket for BUSCH distributorships is 100%. This is the combined market share of all parties to the public ownership prohibition agreement or conspiracy. That figure accurately reflects the power to hurt competition flowing from the public ownership prohibition. Similarly, the applicable market share in the relevant market for beer distributors is 55%. That figure represents the total beer distribution volume of the 700 BUSCH distributors who are parties to the agreement or conspiracy in question.

The Eleventh Circuit concluded that "*Spectators'* is inapposite in that it deals with a conspiracy to boycott a business rather than a vertical restraint imposed by a manufacturer on its distributors." That distinction is neither meaningful nor possible. The definition of a conspiracy is an agreement. In *Spectators'*, the Fifth Circuit noted the existence of a wheel conspiracy with the PGA at the "hub" and the tournament sponsors at the "spokes." BUSCH's 700 agreements with its 700 distributors is another wheel conspiracy, with BUSCH at the hub and its distributors at the spokes. This form of conspiracy creates the same economic effect as a "horizontal" agreement among distributors to coordinate control over the distributorship market through BUSCH. The public ownership prohibition was clearly a conspiracy between BUSCH and its 700 distributors to boycott an

entire class of owners—public owners—from acquiring beer distributorships.[14] Accordingly, the Eleventh and Fifth Circuits are split on whether market power or market share in a conspiracy or agreement which excludes parties from a market should be measured only by reference to the market share of the defendant or the combined market share of the parties to the agreement or conspiracy.

4. The Eleventh Circuit's "Contract Power" Exemption to the Sherman Act is an Important Issue for Supreme Court Review

The Eleventh Circuit has decided an important issue of antitrust law which has not been but should be settled by the Supreme Court. The Eleventh Circuit has created a new rule of antitrust law. This rule excludes from any market power determination consideration of even absolute control over output, prices, entry, and exit in a relevant market so long as that control is exercised by invoking a contract.[15] This novel "contract right"

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[14] The Eleventh Circuit's protestation that the vertical restraint in this case "would appear to be of interest only to Anheuser-Busch" does not speak to the market power issue because conspirators' motives in entering into a conspiracy or an anticompetitive agreement are irrelevant for antitrust purposes. *See MCM Partners, Inc. v. Andrews-Bartlett and Associates, Inc.*, 62 F.3d. 967 (7th Cir. 1995)(the combination or conspiracy element of a Section 1 violation is not negated by the fact that one or more co-conspirators acted unwilling, reluctantly, or in response to coercion); *System Care, Inc. v. Wang Laboratories, Corp.*, 117 F.3d. 1137 (10th Cir. 1997)(combination arose when a buyer made a coerced purchase forced by seller engaged in illegal tying).

[15] BUSCH did not control the relevant market and submarket merely by asserting legitimate contract rights but also by breaching the contracts and threatening bad faith terminations if distributors did not follow BUSCH's demands.

exemption from market power creates a meaningless buzz word without ground in either the Sherman Act or economics.

The Eleventh Circuit's contract power exemption from market power will have its greatest immediate impact on one of the more blatantly anticompetitive type of agreements—agreements that successfully exclude entire classes of competitors from competing within a relevant market. In *Sullivan, supra,* the court assessed the injury to competition caused by an NFL policy prohibiting public ownership of NFL football teams. Noting that it would be "difficult indeed to provide direct evidence of competition when the NFL effectively prohibits it," *Sullivan* emphasized the importance of "*potential*" competition in cases "where the challenge policy limits such competition so that it is not evident in practice." *Id.* at 1100. In similar cases, such as here, where an excluded class of competitors is precluded from actually competing because of a challenged prohibition, it is possible to show only "*potential*" anticompetitive effects. In these cases, it becomes crucial to show market power, and the Eleventh Circuit's "contract power" exemption will create an immediate and frequently insurmountable obstacle. That obstacle is preventing beer distributors from consolidating and increasing efficiencies nationwide.

The Eleventh Circuit's exemption from antitrust scrutiny of market power exerted through contracts has far reaching implications. Dominant manufacturers and franchisors may control either unrelated or derivative downstream markets outside antitrust scrutiny so long as the control is exerted through vertical agreements. They may even, in extreme cases such as here, prevent an entire industry from becoming more efficient and competitive in response to free market forces.

Since market power measures the ability to cause anticompetitive effects affecting an entire relevant market, it is irrational to exclude from consideration the power to cause such effects merely because it is invoked pursuant to contract. Even the yardstick of market share is grounded in contract because market share is merely a measure of the total number of sales contracts for a product obtained by a party. The definitions of market power articulated by this Court refer to matters implemented or embodied in contracts.

In *Jefferson Parrish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2, 14 (1984), this Court described market power as the power "to force a purchaser to do something he would not do in a competitive market." This refers to nothing more than the power to obtain sales contracts containing terms the purchasers would not have agreed to in a competitive market. In *Fortner Enterprises, Inc. v. United States Steel Corp.,* 394 U.S. 495, 503 (1969), this Court defined market power as "the ability of a single seller to raise prices and restrict output." This means nothing more than the seller's ability to enter into fewer sales contracts at higher prices. A rule excluding consideration of matters contained in contracts in making a market power determination is fundamentally incomprehensible. The focus should be on the existence of market power and not the formalistic label applied to its source.

5. Kodak Recognized that Market Power May be Transferred from One Market to Another Through Tying Arrangements

BUSCH's distributorship contracts are merely the vehicles and not the ultimate source of its power in the relevant market and submarkets. Small beer brewers often

experience difficulties finding distributors to handle their lines and are fortunate to obtain any distribution. Furthermore, a relevant submarket for a microbrewer's distributorships is not economically feasible. Microbrewers are not in an economic position to exert the same control over distributorship sales that BUSCH can exercise. BUSCH can implement that level of control because of its power as a brewer. The distributorship contract is merely the vehicle through which BUSCH transfers its power in the market for beer into the market for distributorships.

This transfer of market power between markets is recognized in the "tying" principles articulated by this Court. Specifically, BUSCH agrees to sell its distributors BUSCH products (a market in which BUSCH has market power), but only if the distributor agrees to give BUSCH control over the sale of equity interests in the distributorship. In *Kodak, supra* at 462, this Court noted that a tying arrangement "violates Section I of the Sherman Act if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market." In this case, BUSCH transferred its "appreciable economic power" in the beer market by "tying" the sale of its beer to control over the market for beer distributors. Attaching the label "contract power" instead of "market power" to BUSCH's control creates a distinction without a difference relevant to antitrust law. The Eleventh Circuit, by refusing to recognize that BUSCH could "tie" its market power in beer to obtain power in the market for distributorships, failed to follow the ruling in *Kodak* and its predecessors.[16]

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[16] The Eleventh Circuit's summary conclusion that "MARIS has not adduced sufficient evidence of a tying arrangement coupled with a high market share in the relevant product market for the tying product" is wrong. BUSCH's 700 distributorship agreements tie sales

The Eleventh Circuit analysis of market power ignores the economic reality sought to be captured in market power determinations. By focusing on the insignificant number of distributors owned by BUSCH, BUSCH's role in the relevant market and submarket escapes scrutiny. This is because the Eleventh Circuit ignores BUSCH's market power in the beer market and the control over the distributorship market that flows from it.

Even in market share analyses for traditional product markets, market share is determined, not by the amount of product owned by a defendant, but by the percentage of product sales within the relevant market controlled by a defendant. For instance, a "manufacturer" may license to numerous third parties the assembly of components manufactured by others and then distribute the assembled product through wholesalers and retailers without ever having "owned" any product. Its market share in the relevant market for the assembled product, however, would be the percentage of product sales controlled through the manufacturer's various licensing, assembly, and distribution agreements. This is because market power is a measure of the power to control prices, output, entry, and exit—market share being merely a suggestion of market power.

The technical distinctions drawn by the Eleventh Circuit mask the economic reality of BUSCH's role in the

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of BUSCH beer (tying product) to BUSCH control over the sale of BUSCH distributorships (tied product) and an agreement that distributors will not sell the tied product to a public company. BUSCH has a high market share and market power in the relevant market for beer (48% and rising). BUSCH obtains and enforces an agreement giving it control over the tied product (distributorship) by virtue of its market power in the tied product (beer). This is a tying arrangement.

relevant market and submarket. Holding that BUSCH's market share in beer could not be relied upon to establish market power in distributorships, the Eleventh Circuit removed from a market power determination any consideration of BUSCH's role as the dominant beer brewer. The distinction between so called "contract power" and economic or market power next rendered meaningless BUSCH's absolute control over the sale of any interest in distributorships that distribute a majority of all domestic beer. This analysis yielded the untenable conclusion that a party with the absolute power to control output, entry, exit, and prices in a relevant submarket had no true "economic" or market power in that submarket.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the 11th Circuit entered in conjunction with the judgment sought to be reviewed _____ 1-36

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-16460

D.C. Docket No. 97-00015 CV-OC-10

MARIS DISTRIBUTING COMPANY,
a Florida corporation,

Plaintiff-Appellant,

versus

ANHEUSER-BUSCH, INC.,
a Missouri Corporation,
ANHEUSER-BUSCH COMPANIES, INC.,
a Delaware Corporation, et al.,

Defendants-Appellees.

No. 01-13095

D.C. Docket No. 97-00015 CV-OC-10C

MARIS DISTRIBUTING COMPANY,
a Florida corporation,

Plaintiff-Appellant,

versus

ANHEUSER-BUSCH, INC.,
a Missouri Corporation,

Defendant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(August 19, 2002)

Before ANDERSON, HULL and KENNEDY[*], Circuit Judges.

ANDERSON, Circuit Judge:

Plaintiff Maris Distributing Company (Maris) brought this antitrust action against Defendant Anheuser-Busch, Inc. (Anheuser-Busch), alleging in part that Anheuser-Busch violated §1 of the Sherman Act by prohibiting its distributors from being owned, in whole or in part, by the public. Maris contended that this restriction, contained in Anheuser-Busch's distribution agreements, suppressed the price for equity ownership interests in beer distributorships, and in particular in the submarket of the purchase and sale of ownership interests in Anheuser-Busch beer distributorships. After hearing the evidence at trial, the district court directed a verdict in Anheuser-Busch's favor on the issue of whether Anheuser-Busch had market power, such that there was the potential for genuine anticompetitive effects on competition. However, the court allowed to go to the jury the issue of whether actual anticompetitive effects had been shown by the plaintiff. In response to special interrogatories, the jury then found that

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[*]Honorable Cornelia G. Kennedy, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Maris had established both a relevant market (the purchase and sale of equity ownership interests in beer distributorships) and submarket (the purchase and sale of equity ownership interests in Anheuser-Busch beer distributorships). However, the jury found that Maris had failed to show actual anticompetitive effects as a result of the public ownership restriction. Maris appeals the district court's directed verdict on the issue of market power as well as several other issues related to the trial. For the reasons that follow, we conclude that the district court's actions were proper, and we affirm.

I. BACKGROUND

Anheuser-Busch distributes its brands of beer through a network of approximately 700 authorized wholesale distributors, each with an assigned territory. Maris was one of these distributors from 1968-1997 and was Anheuser-Busch's exclusive distributor for the territory covering Gainesville and Ocala, Florida. Maris paid nothing to Anheuser-Busch in exchange for this distributorship.

The relationship between Anheuser-Busch and each of its distributors is governed by a written contract referred to as the Equity Agreement. Upon becoming a distributor in 1968, Maris agreed as part of the Equity Agreement that Anheuser-Busch had the right to approve any change in Maris's ownership. Less than a year later, in 1969, the Equity Agreement was amended to include a provision that precluded any public ownership (either through sale to a publicly-owned company or via a public offering of stock) of distributorships. It is this provision that is the subject of the instant lawsuit. Maris did not object to the amendment when the provision was added in 1969, and it also signed two subsequent versions of the Equity Agreement – one in

1974 and one in 1982 – each of which contained similar prohibitions against public ownership.

The operative agreement between Maris and Anheuser-Busch at the time this lawsuit was filed was the 1982 Equity Agreement, paragraph 4(i) of which provided:

> Under no circumstances shall Wholesaler or any owner of Wholesaler have the right to transfer any ownership interest in the business of Wholesaler if such transfer would result in Wholesaler being owned in whole or in part, directly or indirectly, by the public.

The Equity Agreement provides, however, that distributors may sell distributorships, including the right to distribute Anheuser-Busch products, to any non-public entities, provided that they seek and obtain Anheuser-Busch's approval. Another provision required the distributor to provide Anheuser-Busch with notice of its intent to sell and to allow Anheuser-Busch to have an exclusive right to negotiate for the purchase of the distributorship for 45 days.

On August 25, 1996, following a meeting with Anheuser-Busch, Maris submitted a "Notice of Intent to Sell," pursuant to the terms of the Equity Agreement. During the subsequent negotiations, Anheuser-Busch made two offers to purchase Maris – one for $20.4 million and one for $21.5 million. Maris did not accept these offers and made no counter-offer.

After the required 45-day negotiation period with Anheuser-Busch, Maris indicated that it would seek to sell

the business to a third-party. Maris had discussions with at least six potential buyers, but never submitted a proposed purchaser to Anheuser-Busch. According to Anheuser-Busch, Maris's lack of success in finding a buyer was in part because Maris demanded an unreasonably high price – $60 million – and because it acted unreasonably in its negotiations with potential buyers. Anheuser-Busch also attributes some of Maris's difficulties to the fact that it employed a broker, Irvin Philpot, who Anheuser-Busch says was a convicted felon and an otherwise unsavory character.

Maris filed this lawsuit on January 22, 1997, challenging the Equity Agreement's public ownership provision. On March 20, 1997, Anheuser-Busch terminated the Equity Agreement with Maris. Anheuser-Busch ceased selling its products to Maris, and assigned Maris's territories to two other distributors. Maris asserted a Sherman Act §1 antitrust claim,[2] alleging that the public ownership provision effected an unreasonable restraint in trade (in the form of a non-price, vertical restraint) by suppressing prices in the relevant market for the purchase and sale of equity ownership interests in beer distributorships, and in the relevant submarket for the purchase and sale of equity ownership interests in Anheuser-Busch beer distributorships.[3]

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[2]Maris also attempted to assert a Sherman Act §1 horizontal restraint claim and a §2 attempted monopolization claim against Anheuser-Busch. The district court dismissed and/or granted summary judgment on those claims, and Maris does not appeal those rulings.

[3]Anheuser-Busch challenged Maris's definitions of the alleged relevant market and submarket. As discussed below, the jury accepted Maris's contentions concerning the relevant market and submarket, and Anheuser-Busch has not appealed those findings. Therefore, we accept for purposes of this appeal Maris's definition of the relevant market and submarket.

Maris's only claim that went to trial in this case was a rule of reason claim under Sherman Act §1, and the parties agree that in order to prevail on its claim, Maris had to prove, inter alia, either that (1) Anheuser-Busch had market power in the relevant market or submarket such that the restraint had potential anticompetitive effects, or (2) the restraint resulted in actual anticompetitive effects on the relevant market or submarket. See Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538, 1551 (11th Cir. 1996).

On the issue of market power, the evidence showed that Anheuser-Busch only owned all or part of 20 out of approximately 700 Anheuser-Busch distributorships[4] and 2700 distributorships of all brands of beer. This indicates that Anheuser-Busch's market share in the alleged relevant market was less than 1%, and that its share of the Anheuser-Busch submarket was still only 2.9%. Nonetheless, Maris argued that it could show market power based on the fact that Anheuser-Busch had a 48% market share in the manufacture of beer.

Despite Anheuser-Busch's small market share in the relevant market and submarket, Maris's experts testified that in the case of vertical restraints, a defendant's market share in manufacturing can result in market power in the relevant market for the purchase and sale of ownership interests in distributorships. These experts stated that when Anheuser-Busch's market share in the manufacture of beer is taken together with its contractual

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[4]The evidence was that Anheuser-Busch owned 12 distributorships outright, and that that number had remained fairly constant over time. Moreover, Anheuser-Busch was a limited partner, through the Anheuser-Busch Investment Capital Corp., in 8 other distributorships ("ABICCs"), but that the number of these ABICCs had decreased over time.

influence over the valuations and sales of distributors, and the contractual exclusion of all publicly-owned buyers, then it could be shown that Anheuser-Busch had market power over distributors.

Anheuser-Busch disagreed and argued that Anheuser-Busch's small market share in the relevant market precluded as a matter of a law a finding of market power. The district court agreed with Anheuser-Busch and excluded Maris's expert testimony concerning market power, finding as a matter of law that market share could not be imputed to the alleged relevant market for the purchase and sale of equity ownership interests of beer distributorships from the separate market of the manufacture and sale of beer. The district court also agreed with Anheuser-Busch that market power could not be shown by evidence of Anheuser-Busch's influence over entry and exit to the market because, the court found, such evidence only showed contract power and not market power. Therefore, the court also excluded that evidence. After excluding this evidence, and in light of Anheuser-Busch's small market share in the relevant market and submarket, the district court entered a directed verdict in favor of Anheuser-Busch on the issue of market power.

Although the district court directed a verdict on the market power issue, the court allowed to go to the jury the issue of whether Maris nonetheless had proven actual anticompetitive effects as a result of the public ownership restriction. Maris attempted to prove several actual anticompetitive effects, including: 1) the suppression of the price at which beer distributorships are sold, 2) a reduction in output (sales of distributorships) as a result of suppressed price, 3) the creation of barriers to entry into the market, 4) the creation of a barrier to exit the market, and 5) harm to consumers in the form of higher beer prices

as a result of decreased competition among distributors.

In its special verdict, the jury found in favor of Anheuser-Busch on the issue of actual anticompetitive effects. Based on this verdict, the district court entered judgment in favor of Anheuser-Busch, and taxed Maris with costs.

II. ISSUES

Although Maris raises several issues on appeal, only two of those issues merit extended discussion.[5] These

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[5]In addition to the issues discussed in the text, Maris also maintains that it was prejudiced by several rulings by the district court at trial, including allowing Anheuser-Busch to refer to its alleged reasons for terminating Maris's distributorship and allowing Anheuser-Busch to refer to the criminal record of Maris's broker, Irvin Philpot. After careful review of the arguments of the parties and the record as it relates to these issues, we find them to be without merit and we affirm without further discussion.

Maris also maintains that the district court erred by allowing Anheuser-Busch to cross-examine Maris's expert witnesses concerning the lack of evidentiary support for certain propositions, even though Anheuser-Busch had objected to supplying related information (mostly related to beer prices and previous sales of Anheuser-Busch distributorships) during discovery based, in part, on relevancy objections. Maris argues that Anheuser-Busch should have been judicially estopped from taking this approach. See New Hampshire v. Maine, 532 U.S. 742, 121 S. Ct. 1808 (2001) (discussing factors for judicial estoppel). For several reasons, we think Maris's argument is without merit. First, it is clear that Maris was provided with a great deal of the relevant information during discovery and that much of the other data was publicly available to Maris and its experts if they had sought it out. Second, it does not appear that Anheuser-Busch took positions during the course of the litigation that were "clearly inconsistent," see id. at 1815, just because it originally maintained that certain issues were irrelevant, but then sought to cross-examine Maris's witnesses on those issues after the trial court allowed them to be introduced. Finally, it appears that Anheuser-Busch's cross-examination on these issues was fair, and that

are:

1. Whether the district court erred in granting a directed verdict in favor of Anheuser-Busch on the issue of market power, and in excluding related evidence.

2. Whether the district court abused its discretion by awarding certain costs related to discovery depositions and expedited trial transcripts.

III. DISCUSSION

A. Directed Verdict on Market Power

Maris's primary claim on appeal is its contention that the district court erred by directing a verdict in Anheuser-Busch's favor on the issue of market power (and excluding related evidence). Maris argues that the ban on public ownership contained in Anheuser-Busch's distributorship agreements is an unreasonable vertical restraint in violation of §1 of the Sherman Act. The parties are in agreement that Maris's claim was subject to the "rule of reason," rather than per se antitrust analysis. In Levine v. Central Florida Medical Affiliates, Inc., 72 F.3d 1538 (11th Cir. 1996), we discussed the legal standards applicable to such a claim:

> Under the rule of reason, the "test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby

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it would have been unfair to deny Anheuser-Busch the opportunity to conduct a thorough cross-examination of Maris's witnesses based on the positions that it took during discovery. Therefore, we also reject Maris's judicial estoppel argument.

> promotes competition or whether it is such as may suppress or even destroy competition." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918). Rule of reason analysis requires the plaintiff to prove (1) an anticompetitive effect of the defendant's conduct on the relevant market, and (2) that the conduct has no procompetitive benefit or justification.
>
> In order to prove an anticompetitive effect on the market, the plaintiff may either prove that the defendants' behavior had an "actual detrimental effect" on competition, or that the behavior had "the potential for genuine adverse effects on competition." In order to prove the latter, the plaintiff must define the relevant market and establish that the defendants possessed power in that market.

Id. at 1551 (citations and quotations omitted). Ultimately, in order to consider a rule of reason claim based on a vertical restraint, we have stated that a court must conduct a "systematic comparison" of the negative effects of the restraint on competition and compare that with the positive effects on competition stemming from the restraint. Id. at 1571. Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1571 (11th Cir. 1983)

Maris claimed, and the jury so found, that the relevant product market was the market for the purchase and sale of equity ownership interests in beer distributorships, and that there was a relevant submarket for the purchase and sale of equity ownership interests in Anheuser-Busch beer distributorships. The jury also found

that the plaintiff had failed to prove an anticompetitive effect in the form of an "'actual detrimental effect' on competition." See Levine, 72 F.3d at 1551. The only issue before us involves whether the plaintiff made a sufficient showing of market power in the relevant market and submarket to present a triable issue on "the potential for genuine adverse effects on competition." Id.

As Maris points out, "[t]he question of market power is a factual one," and it argues that the question of whether Anheuser-Busch had market power should have been left to the jury. Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1580 (11th Cir. 1991). For the reasons that follow, we conclude that the district court was correct in determining that, as a matter of law, Anheuser-Busch was entitled to a directed verdict on the market power issue.

"A district court may enter judgment as a matter of law if a party has been fully heard on an issue and there is no legally sufficient basis for a reasonable jury to find in favor of that party on that issue. When considering such a motion, the court must evaluate all of the evidence, together with any logical inferences therefrom, in the light most favorable to the nonmoving party." Carter v. Decisionone Corp., 122 F.3d 997, 1003 (11th Cir. 1997). See Fed. R. Civ. P. 50. We review de novo an order directing a verdict. Id. at 1004.

In arguing that the district court erred in directing a verdict on the market power issue, Maris makes three different, but somewhat-related arguments. First, it argues that Anheuser-Busch's market share in beer should have been imputed to the alleged relevant market for the purchase and sale of ownership interests in beer distributorships. Second, it maintains that even if such an

imputation is not appropriate, Anheuser-Busch's share of the relevant market should be aggregated with the share held by all other parties to its distributor agreements, including all of Anheuser-Busch's distributors. Finally, Maris contends that the district court erred by finding that certain restrictions imposed by Anheuser-Busch on its distributors evidenced only contract power, and not market power. As we shall explain, we find that none of these contentions has merit.

1. Imputation of Market Share to Relevant Market

As mentioned above, the district court determined, as a matter of law, that Anheuser-Busch did not have market power in the alleged relevant market for the purchase and sale of equity ownership interests in beer distributorships given its market share of 1% - 3% in that market. Maris, however, maintains that Anheuser-Busch's significant market share in the manufacture and sale of beer is sufficient to show market power in the relevant market and submarket. Specifically, Maris contends that "[i]n cases involving vertical restraints imposed by a manufacturer on distributors, market power is determined by reference to the manufacturer's share of products in the market, not its share of ownership in distributors." Maris's Opening Brief, at p. 45. In other words, Maris maintains that a manufacturer's market share in the market for its products should be imputed to the separate market for ownership interests in the manufacturer's distributorships when a provision in the distributorship agreement is challenged. We disagree.

We begin by noting that Maris's position seems to be foreclosed by our precedent, unless Maris is able to show some "connection" between the two different markets that would justify our consideration of Anheuser-

Busch's market share in the beer market while considering Maris's claim. In Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037 (11th Cir. 1982), we rejected the relevance to an antitrust claim of market power in a market other than the relevant market for the particular claim. In that case, which involved an attempt to monopolize claim, we considered a district court's denial of discovery concerning the defendant's sales of conduit benders in light of the court's finding that the relevant market for the antitrust claims in that case was the market for cable benders. We affirmed the denial of discovery, reasoning that a showing of market power in the cable bender market did not show market power in the relevant market of conduit benders. Id. at 1043. In particular, we noted that this was true because the plaintiff had provided "[n]o proof of any connection between Greenlee's conduct in the conduit bender market and that in the cable bender market." Id. Therefore, we held that a defendant's market share in a market other than the alleged relevant market is irrelevant, and cannot be imputed, at least absent a showing of some "connection" between two different markets that would provide a basis for such an imputation.

We have not been alone in reaching that conclusion. In Intergraph Corp. v. Intel Corp., 195 F.3d 1346 (Fed. Cir. 1999), the Federal Circuit considered a monopolization claim brought by Intergraph against its supplier Intel, a business with a high market share in the market for high performance computer microprocessors. Intergraph alleged in that case that the relevant market for its antitrust claim was the "graphics subsystems" market, a market in which Intergraph and Intel were competitors, but in which neither Intel nor Intergraph had market power. Id. at 1354. In rejecting Intergraph's claim that Intel's role in the microprocessor market supported its claim of monopolization in the graphics subsystem market, the

court stated:

> Intel's market power in the microprocessor market is irrelevant to the issues of this case, all of which relate to the effect of Intel's actions on Intergraph's position in its own markets.

Id. Therefore, the Federal Circuit also declined to impute market share from one market to another for purposes of determining whether a defendant had market power in the second market.

While urging us to accept its position that Anheuser-Busch's market share in the beer market should be imputed to the alleged relevant market for the purchase and sale of equity ownership interests in beer distributorships, Maris primarily relies on two cases – the Supreme Court's opinion in Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549 (1977), and our decision in Graphic Products Distributors v. Itex Corp., 717 F.2d 1560 (11th Cir. 1983). Sylvania is the Supreme Court's seminal case concerning vertical, non-price restraints. In that case, the Supreme Court noted as background that:

> The traditional framework of analysis under § 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis.

> Standard Oil Co. v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Sylvania, 433 U.S. at 49, 97 S. Ct. at 2557. The Supreme Court then went on to explain that "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition," and that even though such restrictions may reduce intrabrand competition, "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Id. at 51-54, 97 S. Ct at 2558-60. Therefore, the Court held that non-price, vertical restraints are subject to analysis under the rule of reason, rather than to per se treatment. Id. at 57-59, 97 S. Ct. at 2561-62.

Maris argues that Sylvania supports its position that Anheuser-Busch's market share in the manufacture and sale of beer could show market power over the alleged relevant market for the purchase and sale of equity ownership interests in distributorships because it maintains that Sylvania indicates that it is a manufacturer's market share in manufacturing that is relevant in judging a vertical restraint. Maris notes that the Supreme Court spoke in terms of the defendant's market share in sales of the manufacturer's end-products. See id. at 38, 97 S. Ct. at 2551 (noting that defendant's market share in sales of televisions increased from 1-2% to 5% following imposition of vertical restraint).

We believe that the difference between Sylvania and the instant case is patent and significant. The relevant market involved in Sylvania was the market for television sets. Therefore, of course the defendant's market share in the manufacture and sale of those products was directly relevant to the issue of whether it had market power in the relevant market. Nothing in Sylvania offers any support, however, for the notion urged by Maris that in the case of a restraint imposed by a manufacturer on its distributors, market share may be imputed from one market (i.e., beer) to another market (i.e., equity ownership interests in distributorships) in order to determine whether the defendant has market power in the second market.

We find equally unavailing Maris's reliance on our decision in Graphic Products Distributors v. Itex Corp., 717 F.2d 1560 (11th Cir. 1983). In that case, we also dealt with a claim concerning non-price, vertical restraints, in the form of territorial restrictions on distributors, and stated that "Sylvania places the competitive effect of particular vertical restraints at the center of the analysis under the rule of reason." Id. at 1568. We noted that as a threshold matter under the rule of reason, a plaintiff must establish that the defendant had market power in a well-defined relevant market, and that "[m]arket power is the ability to raise price significantly above the competitive level without losing all of one's business." Id. at 1568-70. We also recognized that "[m]arket share is frequently used in litigation as a surrogate for market power." Id. 1570.

As Maris points out, in Graphic Products, we did talk in terms of the defendant's market share in the manufacture or sale of the end-products. Id. at 1570-71. However, as was the case in Sylvania, that was because the defined relevant market was the market for those end-products. Therefore, here again, this case does not provide

any basis for imputing market power from one relevant market to another.[6]

In an attempt to provide the type of "connection" that would justify the imputation of Anheuser-Busch's

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[6]It is true that Sylvania and Graphic Products do suggest that a manufacturer's market power in the end-product market does have an influence on the typical vertical restraint analysis. In the typical vertical restraint case, a plaintiff would prove that the defendant had market power in the relevant geographic and product market, and the relevant product market would usually consist primarily of the market for the manufacturer's end-product (which in this case would have been beer). The plaintiff would then prove anticompetitive effects in that market. Finally, there would have to be a systematic comparison of the negative effects which the challenged vertical restraint had on intrabrand competition in the market for the product with the positive effects of the restraint on competition in the interbrand market. Graphic Products, 717 F.2d at 1569-71. Sylvania and Graphic Products suggest that a manufacturer's market power in the end-product market has an influence on the typical vertical restraint analysis for the following reason. If a manufacturer with no market power imposed vertical restraints which increased the price of the end-product, then the manufacturer would necessarily experience a reduction in sales because consumers would substitute the lower priced products of its competitors. Thus the intrabrand restraint would have little effect on overall competition. Graphic Products, 717 F.2d at 1568-69 and n.11.

In this case, Maris did not pursue a typical vertical restraint claim. It did not claim an unreasonable restraint of trade with respect to the end-product, beer. Apparently concluding that it would not be able to show anticompetitive effects or would not be able to show an unreasonable restraint of trade with respect to beer, Maris instead pursued a more atypical claim of restraint of trade in the different market of equity ownership interests in beer distributorships. The fact that Sylvania and Graphic Products suggest that market power with respect to the end-product has influence on the typical vertical restraint case, in which the relevant product market is the end-product, says little with respect to the very different question in this case of whether Anheuser-Busch's alleged market power in the end-product market for beer should be equated with market power in the different relevant market for equity ownership interests in beer distributorships.

market share in the beer market to the market for distributorships, Maris alludes to economic literature bearing on this question. Maris states that its experts relied on "economic literature on vertical restraints which supports the determination of the defendant manufacturer's market power based on its market share in manufacturing." Maris's Opening Br., at p. 46. Other than the conclusory assertion of its experts, Maris provides no economic rationale suggesting that Anheuser-Busch's alleged market power in the beer market should endow it with power in the different market for the purchase and sale of equity ownership interests in beer distributorships. As Anheuser-Busch points out, Maris's expert testified that he could not identify a single non-price vertical restraint case in which a court had imputed market power from an entirely different market.

We have carefully reviewed Maris's arguments and its experts' reports. We conclude that Maris has not identified a valid economic reason why Anheuser-Busch's alleged market power in the beer market should create market power in the different market for the purchase and sale of equity ownership interests in beer distributorships. We also pressed Maris at oral argument in this regard, to no avail.[7]

The relevant market share evidence reveals that Anheuser-Busch possesses only one to three percent of the alleged relevant markets. Under these circumstances, it is clear that Anheuser-Busch's market share in the relevant market is inadequate, standing alone, to permit a finding

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[7]Both Maris and its experts do refer to Anheuser-Busch's contract power with respect to the distributors of Anheuser-Busch products. For the reasons indicated below, infra at Part III.A.3, we conclude that Anheuser-Busch's contract power does not give it market power.

of market power. See Retina Assocs. v. Southern Baptist Hospital of Fla., Inc., 105 F.3d 1376, 1834 (11th Cir. 1997) (holding that the defendants' 15% market share in the relevant market was insufficient as a matter of law to show market power for purposes of a §1 claim); L.A.P.D., Inc. v. General Electric Corp., 132 F.3d 402, 405 (11th Cir. 1997) (noting in context of § 1 claim that "[a] 5% or 10% or 15% share of a normal market . . . does not imply power to raise prices by curtailing output"). Therefore, unless Maris could show some other basis which would have permitted the jury to find that Anheuser-Busch possessed market power in the relevant market, then the district court properly entered a directed verdict on this issue. We turn to Maris's efforts to make such a showing.

2. Aggregation of Market Share

In its second attempt to show that the district court erred by directing a verdict on the market power issue, Maris argues that even if we reject its argument that Anheuser-Busch's market share in the beer market may be imputed to the relevant market in this case, as we have, then we should still find that Anheuser-Busch had sufficient market share to show market power because we should aggregate the market share of all parties subject to Anheuser-Busch's distribution agreements containing the public ownership restriction. This approach would yield a market share somewhere around 48% in the market of ownership interests in beer distributors, and 100% of the submarket of Anheuser-Busch beer distributorships. We conclude that aggregation is inappropriate for purposes of assessing Anheuser-Busch's market share in the type of case before us.

In support of its aggregation argument, Maris primarily relies on the Fifth Circuit's opinion in

Spectators' Communications Network, Inc. v. Colonial Country Club, 231 F.3d 1005 (5th Cir. 2000). In that case, the plaintiff sued one member of an alleged conspiracy to boycott the plaintiff. The district court found that the defendant, who coincidentally was Anheuser-Busch, could not be held liable under § 1 because it individually did not have market power. Id. at 1014. The Fifth Circuit reversed after finding that the market share of all of the co-conspirators should have been aggregated in order to determine whether market power was present, and stated:

> [A]fter all, the reason for looking at market power is to determine whether the combination or conspiracy, not each individual conspirator, has the power to hurt competition in the relevant market.

Id. at 1014.

We conclude that Spectators is inapposite in that it deals with a conspiracy to boycott a business, rather than a vertical restraint imposed by a manufacturer on its distributors. If we were to aggregate the market share of all of Anheuser-Busch's distributors here, that would mean that aggregation of market share would always be required when reviewing vertical restraints. This approach would lose track of the fact that the vertical restriction was imposed by a single manufacturer seeking to regulate its distributors. Requiring aggregation also would make it much more difficult for any manufacturer with a significant market share in the market for its products to agree with its distributors with respect to vertical restrictions – which we know can be pro-competitive. When plaintiffs are able to show that a manufacturer's product constitutes a relevant submarket then aggregation would yield a market share of 100%. We also believe that

aggregation under these circumstances could threaten many franchise agreements, exclusive dealing agreements, and other arrangements traditionally reviewed under the rule of reason, by making market power seem to appear where it does not really exist.

But we need not concern ourselves with aggregation in the context of vertical restraints in general, the particular vertical restraint in the instant case is one that would appear to be of interest only to Anheuser-Busch. Maris has pointed to no evidence that other distributors have sought to prevent Maris from selling to a publically owned entity. Nor has Maris suggested any reason why other distributors might want to do so. Unlike Spectators, there is no agreement or conspiracy here that all Anheuser-Busch distributors will refuse to deal with Maris; no Anheuser-Busch distributor has agreed to do anything, or refrain from doing anything with respect to Maris. Instead, the agreement at issue only involves Maris and Anheuser-Busch.

We hold that it is not appropriate to aggregate Anheuser-Busch's market share with that of its distributors when determining whether Anheuser-Busch has market power in the relevant product market for equity ownership interests in beer distributorships for purposes of assessing a claim that the ban on public ownership constitutes an illegal vertical restraint.

3. Contract Power Versus Market Power

Finally, Maris argues that the directed verdict was improper because the district court based part of its reasoning on the fact that Anheuser-Busch's actions were an exercise in contract power, rather than in market power.

Maris notes that §1 claims always involve a contract or agreement, but that fact does not insulate them from antitrust liability. Maris contends that the exercise of contract power, particularly where a plaintiff is "locked in" to the defendant's product or business, may violate the antitrust laws. Although Maris's argument has some intuitive appeal, in that Anheuser-Busch clearly had some power over Maris and its other distributors by virtue of the contractual provisions in its distribution agreements, we find the cases relied upon by Maris distinguishable, and agree with the district court that Anheuser-Busch's exercise of its contract power over Maris did not show that Anheuser-Busch had market power in the relevant market.

We begin by noting what the relevant question before us is not. It is not whether the exercise of contract power can be an antitrust violation. Contracts, and the exercise of contract power, may run afoul of the antitrust laws, as evidenced by the fact that §1 of the Sherman Act prohibits any "contract, combination . . ., or conspiracy, in restraint of trade." 15 U.S.C. §1 (emphasis added). Therefore, if the district court had held that Anheuser-Busch had not violated the antitrust laws simply because its actions were pursuant to a contract, that would have been incorrect. Anticompetitive actions are not immunized by virtue of being memorialized in a contract.

The more interesting issue, and the one we think the district court was addressing when it spoke of contract power, is the relationship between contract power and market power. We believe, for the reasons that we discuss below, that the district court correctly recognized that, while a party who exercises contract power may have market power and may violate the antitrust laws under some circumstances, the mere existence and exercise of contract power does not show that a defendant had market

power or violated the law. In other words, courts must attempt to ascertain a defendant's economic position in the relevant market, rather than its power pursuant to a particular contract, when considering whether a defendant has market power.

In arguing that the district court erred with respect to the contract power issue, Maris begins by pointing to the Supreme Court's decision in Eastman Kodak v. Image Technical Servs., 504 U.S. 481, 112 S. Ct. 2072 (1992), the relevant part of which involved a tying claim. Although Kodak does not address the issue of when the exercise of contract power should be viewed as market power, it does address issues of market definition and market power in a context in which a plaintiff is "locked in" to a relationship with a defendant. In Kodak, the plaintiffs had established triable issues of fact concerning the existence of a tying arrangement – i.e., whether Kodak parts and service for Kodak photocopy and micrographic equipment were distinct products subject to a tying analysis. Id. at 462-64, 112 S. Ct. at 2080. The Court noted that there was sufficient evidence that consumers viewed parts and service as separate products. Id. The Court also noted that parts for Kodak equipment were unique and were not interchangeable with other manufacturers' parts because only Kodak parts would work on Kodak machines. Id. at 456-57, 112 S. Ct. at 2077. Because of these factors, the Supreme Court held that a jury could find a tying arrangement between Kodak parts (the tying product), and Kodak service (the tied product). Id. at 463-64, 112 S. Ct. at 2080.

The Court then proceeded to consider whether there was sufficient evidence that Kodak had market power in the market for Kodak parts such that it could force unwanted purchases of the tied product (service for Kodak

machines). Id. at 464, 112 S. Ct. at 2081. Kodak defended, arguing that the brisk competition in the original market for the photocopy and micrographic equipment would prevent it from having market power in the aftermarkets for service and parts, even though it had a dominant share of those markets – nearly 100% of the market for Kodak parts. Id. at 465-68, 112 S. Ct. at 2081-83. Kodak argued that any attempt by it to charge supracompetitive prices for service or parts would inevitably lead to a reduction in sales of Kodak equipment because consumers would buy, or switch to, competing equipment. Id. at 465-66, 112 S. Ct. at 2081-82. Among the factors undermining this argument by Kodak, the Supreme Court pointed to the heavy initial cost for Kodak equipment. Id. at 476-77, 112 S. Ct. at 2087. The Court concluded that this high "switching cost" served to "lock in" existing customers, inhibiting their taking advantage of the brisk competition in the equipment market by switching to competitors' equipment. Id.

Maris argues that the same is true when a plaintiff, such as itself, is "locked in" by a distribution agreement with a manufacturer. Therefore, Maris urges us to find that this "lock-in" gave Anheuser Busch market power.

In addition to Kodak, Maris also seeks support from a case in which a franchisee brought antitrust claims against a franchisor challenging a provision in the franchise agreement, and a district court in our circuit found that the exercise of rights under a contract may run afoul of the antitrust laws. See Collins v. Int'l. Dairy Queen, Inc., 939 F. Supp. 875 (M.D. Ga. 1996). In that case, the court considered a tying claim brought by a franchisee, alleging that Dairy Queen's requirement that food and supplies be purchased from it constituted an unlawful tying arrangement. Dairy Queen argued that it

could not be held liable for tying because the restraint was simply part of the franchise agreement and that any power over the franchisee resulted from that agreement rather than market power. Id. at 883. The district court rejected this argument, relying on a variation of the "lock-in" concept from the Kodak decision:

> Plaintiffs have shown that Dairy Queen franchisees make significant initial investments in their franchises, which also provide them the option to open additional stores without paying another franchise fee. In addition, IDQ/ADQ can terminate or refuse to renew a franchise agreement if a franchisee fails to carry the full authorized menu of food products or does not meet quality standards. Because of the excessive costs and potential losses associated with purchasing another franchise, a Dairy Queen franchisee wishing to obtain products and supplies from alternative sources at lower costs may be locked in to the existing arrangement enjoyed by IDQ/ADQ. Based upon these cases, the court finds that plaintiffs have produced sufficient evidence of economic loss, overpriced products, and refusal to consider alternative sources of comparable products to preclude the entry of partial summary judgment based on the existence of a franchisor-franchisee relationship.

Id. at 883. Therefore, the court held that the franchisee might have a viable claim against the franchisor, even though the restriction of which it complained was contained in the franchise agreement to which it had

agreed.

In tension with the district court's holding in Collins, several of our sister circuits have cautioned against placing too much weight on the existence of contract power when defining relevant markets and determining whether defendants possess market power. In a case involving facts similar to those in Collins, the Third Circuit reached a different result. See Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997). In Queen City the court considered a §2 monopoly claim brought by a franchisee against a franchisor related to a requirement in the franchise agreement that the franchisee only purchase from the franchisor or approved suppliers. The franchisor, Domino's, argued that its:

> [P]ower to force plaintiffs to purchase ingredients and supplies from them stemmed not from the unique nature of the product or from its market share in the fast food franchise business, but from the franchise agreement. For that reason, plaintiffs' claims implicate principles of contract, and are not the concern of the antitrust laws.

Id. at 435 (citations and quotations omitted). The district court agreed and dismissed the plaintiffs' claim.

The Third Circuit agreed that the exercise of contract power resulting from the provisions of a franchise agreement did not raise antitrust concerns and that the franchisee failed to state a valid, relevant product market when it limited the alleged relevant market to parties who had entered into Domino's franchise agreements. Id. at

438. The court stated:[8]

> A court making a relevant market determination looks not to the contractual restraints assumed by a particular plaintiff when determining whether a product is interchangeable, but to the uses to which the product is put by consumers in general. Thus, the relevant inquiry here is not whether a Domino's franchisee may reasonably use both approved or non-approved products interchangeably without triggering liability for breach of contract, but whether pizza makers in general might use such products interchangeably. Clearly, they could. Were we to adopt plaintiffs' position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws. Perhaps for this reason, no court has defined a relevant product market with reference to the particular contractual restraints of the plaintiff.

Id. In this regard, the Third Circuit also rejected a "lock-in" argument derived from Kodak, noting that the challenged provision in the franchise agreement was part of the deal when the franchisee entered the agreement, and

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[8]For the same reasons, the Queen City court rejected the plaintiff's definition of the relevant product market for the alleged tying product, thus rejecting the plaintiffs' tying claim. Id. at 442-43.

holding that the crucial fact driving the determination of the relevant product market was that Domino's-approved supplies and ingredients were fully interchangeable with substitutes from other pizza suppliers. Id. at 439-40. The court recognized that contracts always restrain and affect a party's available choices, but that for purposes of determining a relevant product market, a court looks not to contractual restraints on a particular consumer, but rather to the uses to which the product is put by consumers in general and whether there are interchangeable substitutes.

The Fifth Circuit also took this approach when faced with a similar claim in United Farmers Agents Assoc., Inc. v. Farmers Ins. Exchange, 89 F.3d 233 (5th Cir. 1996). The court stated that "[e]conomic power derived from contractual agreements such as franchises or in this case, the agents' contract with Farmers, 'has nothing to do with market power, ultimate consumers' welfare, or antitrust.'" Id. at 236. The court looked for the insurance company's market share in the market for insurance, rather than in a more specific market related to services required for the company's agents. Id. at 237.

Likewise, in Hack v. President and Fellows of Yale College, 237 F.3d 81 (2d Cir. 2000), the Second Circuit considered this issue in the context of a monopolization claim brought by students against their college based on the college's requirement that the students live in dormitories for their freshman and sophomore years. Citing Queen City, the court rejected the plaintiffs' market definition and affirmed dismissal of the claim, holding: "Economic power derived from contractual arrangements affecting a distinct class of consumers cannot serve as a basis for a monopolization claim." Id. at 85. Accord Double D Spotting Serv., Inc. v. Supervalu, Inc., 136 F.3d 554, 560-61 (8th Cir. 1998) (holding that market defined

by one contract was not relevant market for antitrust purposes).

We agree with the approach taken by our sister circuits on this issue, and conclude that the district court correctly distinguished between contract power and market power in determining that Anheuser-Busch was entitled to a directed verdict as to part of Maris's claim.[9] The fact that Anheuser-Busch had considerable power over many aspects of Maris's business by virtue of the provisions of the contract to which they agreed (at least 3 separate times) reveals little about the issue of whether Anheuser-Busch had market power in the broader, relevant market for the purchase and sale of equity ownership interests in beer distributorships. And there is no reason for us to believe that Anheuser-Busch's decision to exercise its rights under that agreement also were exercises of market power.

Our conclusion is consistent with the decision of the former Fifth Circuit in Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975).[10] In that case, a beer distributor brought a §1 Sherman Act claim challenging, among other things, the manufacturer's right to restrain the price at which the distributor could sell his distributorship. Id. at 693. We concluded that the district court erred by instructing the jury that it would be a per se violation of the antitrust laws for the manufacturer to dictate the sale price of the plaintiff's distributorship. Id. at 695. We held that any such restriction was subject to rule of reason review,

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[9] Likewise, we conclude that the district court did not abuse its discretion by excluding certain evidence related to the market power issue.

[10] In Bonner v. City of Pritchard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

and noted that "[i]t is beyond question . . . that [a manufacturer] may legitimately restrict the class of persons with whom it would agree to continue a . . . franchise, so long as such restriction was not artificially employed to further some unlawful practice." Id. at 696. Based on this right, the Court continued:

> It logically follows that Falstaff has a right to restrict the sales price of one of its distributorship franchises to the reasonable value of that franchise in order to insure that the purchaser will have a chance to realize a reasonable return on his investment. Falstaff clearly has a strong interest in the financial vitality of a new franchisee. If the purchaser of a franchise makes a bad bargain when he buys, then he cannot give the distributorship the solid, concerned management which it must have to be successful for him and to enhance Falstaff's image and relative position in the market.

Id. We also noted that this recognition of a manufacturer's interest in the identity of its distributors and in the transfer of its distributorships had been recognized by an earlier case in which we had "held that an automobile manufacturer possessed a limited privilege to approve or disapprove a prospective purchaser since it would deal with the purchaser in the future and would represent it to the public." Id. (citation omitted). Although we did not discuss directly address the issue in Kestenbaum, it is clear from our discussion that we did not believe that the defendant's contractual power under its distribution agreement with the plaintiff yielded market power.

Consistent with the holdings of the Third Circuit in

Queen City, and the Fifth Circuit in United Farmers Agents, we believe that the Supreme Court decision in Kodak is distinguishable from the instant case. As noted in our discussion of Kodak above, that opinion did not address at all the issue in this case – i.e., whether contract power is the equivalent of market power for antitrust purposes. Moreover, the context of Kodak is entirely different from the instant context. There is no argument in this case that brisk competition in one market would prevent a defendant from having market power in another market, despite the defendant's dominant share in that market, because consumers would switch to competitors' substitute products in the competitive market. Unlike Kodak, Maris has not adduced "sufficient evidence of a tying arrangement," coupled with a high market share in the relevant product market for the tying product. Kodak, 504 U.S. at 464-65, 112 S. Ct. at 2080-81. Unlike Kodak, the defendant in the instant case has not defended against an otherwise viable antitrust claim (supported by sufficient evidence of the defendant's high market share in the relevant market) by arguing that market power was lacking, despite its high share of the market, because of the brisk competition in another market. It was because of this defense in Kodak that it became relevant whether or not customers could switch to competitors' equipment. In this context, Anheuser- Busch has made no such argument that an otherwise viable claim involving a defendant with a large share of the relevant market is undermined by brisk competition in some other market. Thus, the instant case does not involve the Kodak issue of whether or not consumers can switch to a competitor.

Indeed, Maris has never argued, either in the district court or on appeal, that high switching costs were relevant in the instant case. Nor does he explain how such costs,

even if proved, would be relevant to the issues before us.[11] For all these reasons, we find Maris's reliance on Kodak to be misplaced.[12]

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[11]We do not believe that switching costs – even if the argument had been presented and even if it were supported by evidence – are relevant to the issues before us. It may be that a distributor's ability to switch readily to another beer manufacturer (e.g. Miller or Coor's) might have offset the force of a viable antitrust claim supported by evidence of market power in the chosen relevant product submarket of ownership interests in Anheuser-Busch beer distributorships. However, that issue was never reached in the instant case because Maris failed to establish market power in the chosen relevant product markets and failed to establish any actual anticompetitive effect in those markets. Thus, Maris's claim failed without regard to whether or not there might have been high switching costs.

[12]It also appears that the context in which the district court in Collins invoked the Kodak concept of consumers being "locked in" by switching costs was a context more similar to Kodak than the context of the instant case. The franchisee in Collins had already established that the defendant had a large share of the market for the tying product; Dairy Queen enjoyed a 91% market share of the relevant product market of soft-serve ice cream. Indeed, the franchisee had adduced sufficient evidence to avoid summary judgment with respect to all of the elements of the tying claim, including market power in the tying product and including substantial evidence of supracompetitive prices in the tied products and other evidence of coercion and anticompetitive effects. In defense, Dairy Queen relied upon Queen City "as authority for the proposition that an illegal tying arrangement cannot exist as a matter of law between a franchisor and its existing franchisees." Collins, 939 F. Supp. at 883. Although it is not absolutely clear from the opinion, Dairy Queen's argument apparently was an attempt to avoid having the case sent to the jury by asserting that the franchisee could always switch franchises and do business with another franchisor. Thus, it seems probable that the context in which the Collins court invoked the "lock-in" concept from Kodak was the same context involved in Kodak itself, and a very different context from the one in the instant case. In any event, it is clear that the Collins court did not expressly address or reject the issue which is crucial for the instant case, i.e., whether contract power equates to market power for antitrust purposes. However, to the extent that

For the foregoing reasons, we follow the rationale of the Third Circuit in Queen City and its progeny. We would be reluctant to adopt Maris's assertion that contract power should automatically be equated with market power. To do so would radically transform the accepted rule of reason analysis applicable to vertical restraints. Maris's theory would place significant additional risks on such legitimate business practices as exclusive dealing arrangements, output contracts and franchise tying agreements. See Queen City, 124 F.3d at 438 ("Were we to adopt plaintiff's position that contractual restraints render otherwise identical products non-interchangeable for purposes of relevant market definition, any exclusive dealing arrangement, output or requirement contract, or franchise tying agreement would support a claim for violation of antitrust laws."). Therefore, we affirm the district court's directed verdict in favor of Anheuser-Busch on the issue of market power.

B. The District Court's Costs Award

Finally, Maris argues that the district court erred by awarding costs related to certain depositions taken by Anheuser-Busch that were not used at trial, and for costs associated with receiving expedited, daily transcripts of the trial proceedings. The district court held that the deposition costs should be taxed because all of the people Anheuser-Busch deposed had been identified by Maris on its witness list, and the depositions consequently were "taken within the proper bounds of discovery" and were necessary in light of the facts known to Anheuser-Busch at the time. With respect to the cost of expedited transcripts,

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Collins supports the proposition that contract power is equated to market power for antitrust purposes, we reject Collins in favor of what we consider to be the more persuasive rationale of Queen City and its progeny.

the district court stated:

> According to the Defendant, such transcripts were necessary to the preparation of a defense, including witness examination, jury instructions, and closing arguments. The Defendant further contends that the transcripts were necessary to preserve oral rulings made by the Court and were indispensable because of the length and complexity of the case. The Court agrees that this was a lengthy and complex trial, and objections to the taxation of costs for expedited transcripts and trial transcripts are due to be overruled.

As we will explain, we conclude that the district court did not abuse its discretion in awarding the costs that it did.

We have recognized that we "will not disturb a costs award in the absence of a clear abuse of discretion." Technical Resource Servs. v. Dornier Medical Sys., 134 F.3d 1458, 1468 (11th Cir. 1998). But the Supreme Court has held that a district court abuses its discretion if it awards costs pursuant to Fed. R. Civ. P. 54 in excess of those permitted by Congress under 28 U.S.C. §1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S. Ct. 2494 (1987). Expenses for "the stenographic transcript necessarily obtained for use in the case" are permitted by §1920.

Although some courts have not permitted the recovery of deposition costs where the depositions are for discovery, rather than for use in the case, see Hall v. Ohio Education Assoc., 984 F. Supp. 1144, 1146 (S. D. Ohio

1997), we have held that "[t]axation of deposition costs of witnesses on the losing party's witness list is reasonable because the listing of those witnesses indicated both that the plaintiff might need the deposition transcripts to cross-examine the witnesses, . . . and that the information those people had on the subject matter was not so irrelevant or so unimportant that their depositions were outside the bound of discovery." EEOC v. W & O, Inc., 213 F.3d 600, 621 (11th Cir. 2000). Therefore, because all of the depositions of which Maris complains were taken of people on Maris's witness list, the district court did not abuse its discretion by awarding these deposition-related costs.

Whether the costs for the expedited transcripts were properly taxed presents a closer question. In In re Nissan Antitrust Litigation, 577 F.2d 910 (5th Cir. 1978), our predecessor Court found that a district court had abused its discretion by permitting such costs, stating:

> As an individual portion of the costs, the trial court awarded costs for an expedited "daily" transcript requested solely by the defendants and to which the plaintiffs had not agreed. This additional expense was for the convenience of the defendants and was, by no means, indispensable. Therefore, this award was an abuse of discretion.

Id. at 918. See also Pan American Grain Manufacturing Co. v. Puerto Rico Ports Authority, 193 F.R.D. 26, 34 (D.P.R. 2000) (district court in Puerto Rico holding that the additional costs for an expedited transcript should not be permitted where a party "had ample representation during trial, and their attorneys could have taken day-to-day notes on the proceedings"). However, in reaching our conclusion in Nissan, we did not hold that the costs

associated with expedited transcripts could never be deemed "necessary" by a district court. To the contrary, we expressly noted that expedited transcripts were not indispensable in that case.

Although we do not believe that the costs associated with expedited trial transcripts should be allowed as a matter of course, lest litigation costs be unnecessarily increased, the district court found that expedited transcripts were necessary in this case given its length and complexity. Under the circumstances, we cannot say that the district court clearly abused its discretion by reaching this conclusion.

C. CONCLUSION

For the reasons explained above, we conclude that the district court did not err in granting a directed verdict in Anheuser-Busch's favor on the issue of market power, that the district court did not abuse its discretion in awarding the costs that it did, and that the district court in all other respects is due to be affirmed.

AFFIRMED.

Supreme Court U.S.
FILED
JAN 9 2003
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No. 02-872

In the Supreme Court of the United States

MARIS DISTRIBUTING COMPANY,
Petitioner,

v.

ANHEUSER-BUSCH, INC.
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The case described in the petition bears little resemblance to the case that was pleaded, tried before a jury, and affirmed by the United States Court of Appeals for the Eleventh Circuit. In an attempt to create the appearance of a conflict between the circuits where none exists, petitioner has characterized this nonprice vertical restraint case as something it is not – a tying case. Petitioner raises issues for the first time that were never part of the case, are not in the record below, and do not warrant this Court's review.

Respondent Anheuser-Busch, Inc. therefore restates petitioner's Questions Presented to conform to the case that was actually tried and the record below:

1. When a party has pleaded, tried, and appealed a case as one involving a nonprice vertical restraint, can that party raise a tying claim for the first time before the United States Supreme Court?

2. In a nonprice vertical restraint case, is the correct measure of market power the manufacturer's market share in the relevant product market?

3. Can a party with less than 1% of the relevant product market and less than 3% of the relevant submarket have market power?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), respondent states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Respondent states that all of its parent companies and subsidiaries (except wholly-owned subsidiaries) are as follows:

Anheuser-Busch Companies, Inc. is the parent company of Anheuser-Busch, Inc.

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15 U.S.C. § 1 1

28 U.S.C. § 1254 1

OPINIONS BELOW

The opinion of the Eleventh Circuit (Pet. App. 1-36) is reported at 302 F.3d 1207.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2002. The petition was filed on November 13, 2002. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

This case arises from a jury verdict and final judgment for respondent Anheuser-Busch, rejecting petitioner Maris Distributing's claim that paragraph 4(i) of its distribution contract – a nonprice vertical restraint that prohibits public ownership of Anheuser-Busch wholesalerships – is an unreasonable restraint of trade in violation of § 1 of the Sherman Act. In seeking this Court's review, the petition: (1) raises claims and issues that were never part of this case and are not in the record; (2) attempts to create a conflict between the circuits that does not exist; (3) relies on testimony and documents that were excluded

from evidence (which rulings are not challenged here); and (4) persistently misstates the record in a petition that is devoid of a single citation to the record. *See* Sup. Ct. R. 24.1(g). The petition lacks merit and should be denied.

1. Petitioner asserts, for the first time in six years of litigation, that this case involves a tying claim. *See, e.g.*, Pet. 24-27. ***This case is not and has never been a tying case.*** Despite the fact that petitioner filed four complaints, it never pleaded a tying claim. R1-1; R2-19; R3-43; R5-83.[1] The case was not tried or appealed as a tying claim. Indeed, at trial both the district court and petitioner's economic expert, John Pisarkiewicz, agreed that the case involved a vertical restraint, not a tie:

> THE COURT: You would impute market power in the market for the buying and selling of beer to the separate market for the buying and selling of beer distributorships.
>
> [Pisarkiewicz]: Well in tying cases Your Honor that would be exactly the way it would be done.
>
> THE COURT: But ***this is not a tying case.***
>
> [Pisarkiewicz]: ***It is a vertical restraint case.***"

R78-174 to 175 (emphasis added); *see also* R44-619-23 (parties agreed in Joint Final Pretrial Stipulation that "[u]nder

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[1] Anheuser-Busch has cited the record according to the format prescribed by the Eleventh Circuit rules. Volumes 1-54 of the record on appeal are pleadings; volumes 55-92 are hearing and trial transcripts. Thus, "R5-83-20" refers to a pleading at volume 5, docket entry number 83, page 5. "R76-13" refers to an excerpt from the trial transcript at volume 76, page 13.

Section 1 of the Sherman Act, the prohibition on public ownership is a vertical, nonprice restraint analyzed under the rule of reason"); R45-627-1 (district court adopts Joint Final Pretrial Stipulation as part of Pretrial Order).

Similarly, petitioner suggests – without citation to the record – that Anheuser-Busch uses its contractual right to approve the sale of wholesalerships to "control output, prices, exit, and entry" in the relevant product market.[2] *See* Pet. 14; *id.* at 12. Yet Maris Distributing specifically disclaimed – in its complaint, at trial, and before the Eleventh Circuit – that it was challenging this right-of-approval provision as an antitrust violation.[3] R3-42-3 n.3. Indeed, at trial, Rudy Maris (President of Maris Distributing) conceded that "Anheuser-Busch should have that right of approval." R66-8; *see also* R66-152.

2. Petitioner also suggests that the decision below is at odds with precedent from this Court and also conflicts with the decisions of two other courts of appeal. *See* Pet. 15-22. But petitioner's arguments are fundamentally flawed. None of the allegedly "conflicting" decisions involve nonprice vertical restraints; rather, they involve tying claims or group boycotts. Those decisions are therefore factually and legally inapposite.

3. Petitioner also relies on exhibits and testimony that were excluded from evidence. For instance, the alleged "detailed written plan" described at pages 8-9 of

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[2] The contractual right of approval is a separate and distinct provision of the distribution contract between Anheuser-Busch and its wholesalers. *See infra* at 5.

[3] Maris Distributing states in its petition to this Court that it does not challenge this provision (*see* Pet. 13 n.7), but that statement is belied by the remainder of the petition.

the petition was ***excluded*** at trial, along with any testimony concerning it. *See* R69-141 to 148; R75-152 to 154; R85-43 to 47. The Eleventh Circuit affirmed that ruling (Pet. App. 8-9 n.5), and petitioner does not challenge that exclusion here.

4. Finally, petitioner takes enormous liberties with the record. For example, to support its claim that Anheuser-Busch can exert leverage over its wholesalers because they are privately owned, petitioner asserts (inaccurately) that "Anheuser-Busch ... directed [its] distributors regarding the prices to charge retailers." Pet. 11 & n.5. This issue was never part of the case at the trial or appellate level, and there certainly is no evidence in the record (or otherwise) that Anheuser-Busch "directed" its wholesalers to charge certain prices to retailers.

Statement of Facts

The Parties And Their Contractual Relationship. Anheuser-Busch distributes its brands of beer through a nationwide network of approximately 700 authorized wholesalers. R64-8. The relationship between Anheuser-Busch and its wholesalers – including petitioner – is governed by a written contract called the Anheuser-Busch, Inc. Wholesaler Equity Agreement ("Equity Agreement"). Def.Ex. 1, R66-151.

Petitioner Maris Distributing was an Anheuser-Busch wholesaler from 1968 to 1997 with an exclusive territory in the Gainesville and Ocala, Florida areas. *Id.*; R67-56 to 58. Contrary to petitioner's suggestion, it paid ***nothing*** for the right to distribute Anheuser-Busch products. R67-46 to 47.[4]

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[4] Maris Distributing's attempt to create the impression that it "bought" the distributorship from Anheuser-Busch (*see* Pet. 4) is inaccurate. Also without merit is the contention that August Busch, Jr. and Roger Maris

The Equity Agreement permits a wholesaler to sell its business – *i.e.*, the right to distribute Anheuser-Busch products – to buyers subject to Anheuser-Busch's right of approval. Upon first becoming a wholesaler in 1968, Maris Distributing agreed, as part of its Equity Agreement, to this right-of-approval provision – which is commonplace in this and other industries. Pl.Ex. 6, R64-141; R88-137 to 138. Maris Distributing has never questioned or challenged this right. R66-8, 152.

In 1969, less than one year after Maris Distributing became an Anheuser-Busch wholesaler, the Equity Agreement was clarified by amendment to expressly preclude public ownership (either through sale to a publicly-held company or via a public offering of stock). Def.Ex. 3, R67-63. Maris Distributing agreed to the 1969 public ownership clarification without objection (Def.Ex. 2, R67-65 to 67) and executed two subsequent versions of the Equity Agreement which contained the same or a similar provision. Pl.Ex. 28, R65-191; Def.Ex. 1. The operative version of petitioner's distribution contract when this lawsuit was filed was the 1982 Equity Agreement. Def.Ex. 1. The public ownership provision was contained in paragraph 4(i).

August Busch III, CEO of Anheuser-Busch Companies, Inc., testified at length about the rationale behind and justification for the prohibition of public ownership of Anheuser-Busch wholesalers: including the fact that the Equity Agreement is a personal services contract; the degree to which Anheuser-Busch relies on its wholesaler network to represent it and provide those personal services to retail

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struck a deal requiring Maris to play an extra year of baseball in exchange for the distributorship. *Id.* Prior to his untimely death, Roger Maris testified under oath that there was no such deal. R37-450-273 to 74 & Ex. 6 thereto.

accounts; and the importance of having local owners who are active in the business and involved in the community. R84-67 to 84. Anheuser-Busch's economic experts also testified to the procompetitive benefits of the provision (*e.g.*, Anheuser-Busch has a highly efficient distribution system; its distributors are considered the "gold standard") and the lack of any anticompetitive effects (*e.g.*, distributors have had no difficulties getting capital). R87-203 to 206; R88-149 to 153.

Similar provisions on public ownership are common in the brewing industry and in franchisor-franchisee relationships – *e.g.*, McDonald's and Subway. R71-74 to 75; R74-28 to 29, 99 to 101; R88-131, 139; Def.Ex. 199, R74-100 to 101.

Maris Distributing's Efforts To Sell. In August 1996, petitioner formally notified Anheuser-Busch of its intent to sell its business. R67-117. Subsequent discussions between the two parties about a sale were unproductive.[5] Thereafter, petitioner's president had discussions with at least six potential purchasers and informal contacts with many others. R66-94 to 103. Maris Distributing was unable to reach an agreement to sell the business to anyone and never submitted a proposed purchaser to Anheuser-Busch for approval. R66-154 to 157, 189.

That petitioner's efforts to sell were unsuccessful had nothing to do with the public ownership provision. Indeed, Maris Distributing never made any effort to determine whether a public sale would be feasible until ***after*** this lawsuit was filed. R67-107 to 108.

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[5] Although Anheuser-Busch had made two offers to purchase the business, Rudy Maris did not accept them, did not make any counteroffer, and never attempted to negotiate a satisfactory sale. R65-58.

Course Of Proceedings Below

Petitioner filed suit in the United States District Court for the Middle District of Florida, alleging that the public ownership prohibition was an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[6] As a challenge to a nonprice vertical restraint, petitioner's claim was tried under the Rule of Reason. Petitioner was required to prove the existence of a relevant product market and that the restraint at issue had an anticompetitive effect in that market without procompetitive benefit or justification. To demonstrate an anticompetitive effect in the market, petitioner had to prove either (a) that Anheuser-Busch had market power in the relevant market such that there is a genuine potential for anticompetitive effects; or (b) that the challenged restraint caused actual and substantial anticompetitive effects in the relevant market.[7] *See Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996), *cert. denied*, 519 U.S. 820 (1996).

The jury trial lasted seven weeks, with Maris Distributing presenting its case-in-chief for six of those

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6 Petitioner later added a Section 2 attempted monopolization claim, and named three corporate affiliates of Anheuser-Busch as defendants on that claim and the Section 1 claim. R5-83. The Section 2 claim and all claims against the affiliate defendants were dismissed on summary judgment. R42-597. These claims were not part of the trial or appeal and have no bearing on this petition.

7 The petition incorrectly states the Rule of Reason test by suggesting that, in lieu of actual anticompetitive effects, it was required to prove both market power ***and*** potential anticompetitive effects. *Compare* Pet. 3, 12. The Rule of Reason, as articulated by the Eleventh Circuit, requires that an antitrust plaintiff prove (1) actual anticompetitive effects in a relevant market or (2) market power in a relevant product market. *See* Pet. App. 6. "Potential" anticompetitive effects are not a separate element of proof but rather are subsumed within the market power analysis. *Id.*

weeks.[8] Maris Distributing claimed that the relevant product market was "the purchase and sale of equity ownership interests in wholesale beer distributorships." R5-83-21. Although Anheuser-Busch disputed the existence of such a market, the evidence was undisputed that Anheuser-Busch's share of that alleged product market was ***less than 1%***. R76-216 to 220; R78-173; Def.Ex. 1509, R76-220. Accordingly, at the close of all the evidence, the district court entered judgment as a matter of law for Anheuser-Busch on the market power issue. R90-4 to 6.

The case went to the jury on special interrogatories. The jury returned a verdict that the provision on public ownership did not violate § 1. R52-789. Although the jury found for Maris Distributing on product market definition, it found that the public ownership provision had ***not*** caused actual and substantial harm to competition in that market.[9] *Id.* The district court entered final judgment for respondent Anheuser-Busch. R52-790.

On appeal, the Eleventh Circuit affirmed. Addressing the market power issue, the court ruled that (1) Maris

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[8] In the 3½ years between the filing of its initial complaint (January 1997) and trial (September 2000), Maris Distributing received extensive discovery: 40,000 pages of documents, answers to 62 interrogatories, responses to 164 requests for admissions, and 28 fact and expert depositions, including a four-day deposition of the corporate representative of Anheuser-Busch. R41-559-3 to 4; R53-799-5.

[9] Given the jury's finding that, after thirty years, the public ownership prohibition had no ***actual*** anticompetitive effects, it is difficult to understand the rationale for petitioner's contention that it should have been permitted to argue the market power issue to the jury to demonstrate a ***potential*** for such effects. This Court has observed previously that market power is "but a 'surrogate for detrimental effects.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (citation omitted).

Distributing could not rely on Anheuser-Busch's market share in beer sales to prove that Anheuser-Busch had market power in the separate market for the purchase and sale of ownership interests in beer wholesalerships; (2) Maris Distributing could not "aggregate" the market share of Anheuser-Busch in the relevant product market (1-3%) with the market shares of its wholesalers; and (3) the "mere existence and exercise of contract power" – such as the right of Anheuser-Busch to approve changes in ownership of its wholesalers to demonstrate market power – "does not show that a defendant ha[s] market power." *See* Pet. App. 11-33. The Eleventh Circuit also rejected petitioner's challenges to various evidentiary rulings. *Id.* at 8-9 n.5.

REASONS FOR DENYING THE PETITION

The decision below is correct, does not conflict with decisions of this Court or any other court of appeals, and does not pose any question that warrants further review.

I. This Case Is Not And Has Never Been A Tying Case

Petitioner's newly-minted tying claim is not properly before this Court. This case was pleaded, litigated, tried, and appealed as a nonprice vertical restraint. Maris Distributing did not raise a tying claim in any of its four complaints before the district court or in its appeal to the Eleventh Circuit, and neither court analyzed or passed on the merits of such a claim. Indeed, in the Joint Final Pretrial Stipulation, the parties stipulated that one of the "applicable principles of law on which there is agreement" was that the public ownership prohibition was a "vertical, non-price restraint analyzed under the rule of reason." R44-619-23. During the trial, petitioner's own economic expert, John Pisarkiewicz, confirmed what had been understood by the parties and the

court since Maris filed its initial complaint – that this was a vertical restraint case, not a tying case. R78-174 to 175.

Nevertheless, petitioner now relies almost exclusively on a tying theory. *See, e.g.*, Pet. 15-17 (contending that Eleventh Circuit failed to follow this Court's decision in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), a tying case); *id.* at 17-19 (asserting that there is a split between the Eleventh Circuit's opinion and a Sixth Circuit tying case); *id.* at 24-27 & n.16 (claiming that this case involves an unlawful tie)). Thus, the entire petition is premised on a theory and claim that were neither raised nor decided in the courts below.

A party may not raise an issue for the first time on appeal, much less in a petition for a writ of certiorari. *See Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("[The] question was not raised in the Court of Appeals and is not properly before us"); *see also United States v. United Foods*, 533 U.S. 405, 417 (2001) (refusing to consider issue not raised below). The petition should be denied for this reason alone.

In any event, petitioner's belated tying claim makes no sense. The suggestion that Anheuser-Busch "ties" the distribution contract (*i.e.*, Equity Agreement) to the sale of Anheuser-Busch products (*see* Pet. 25-26 & n.16) imposes an artificial and non-existent distinction. This argument implies that a wholesaler should be able to purchase Anheuser-Busch products for distribution without actually acquiring the legal right to distribute them (*i.e.*, signing the distribution contract). Any suggestion that a manufacturer has created a tying arrangement by requiring a wholesaler to acquire those distribution rights is without merit. *See Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91, 97-98 (2d Cir. 1985) (finding no tie between petroleum

trademark and gasoline because "Th[e] trademark is thus inseparably connected with the gasoline.... [I]t is not distinct from the gasoline sold"); *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975) (reversing trial court for erroneously "considering the [Shell] trademark as a separate product sold under a tying arrangement with the [Shell] gasoline"), *cert. denied*, 425 U.S. 912 (1976); *T.A.M., Inc. v. Gulf Oil Corp.*, 553 F. Supp. 499, 507 (E.D. Pa. 1982) ("Plaintiffs cannot claim that Gulf imposed an unwanted commodity upon them by tying the product Gulf gasoline to the Gulf franchise. It was the franchise with its attendant right to sell Gulf gasoline which plaintiffs bargained for in becoming franchisees").

Moreover, were the petitioner's reasoning to be accepted, ***all*** franchise and distribution contracts and exclusive dealing arrangements would be illegal per se and ***all*** distributorship terminations would be antitrust violations:

> [T]o hold that a distributorship relationship is a tying product, to which is tied all products which a manufacturer desires a distributor to sell, would render all exclusive dealing arrangements per se illegal .... [It] would similarly destroy the *Colgate* doctrine which permits termination of distributorship contracts as unilateral refusals to deal.

Refrigeration Eng'g Corp. v. Frick Co., 370 F. Supp. 702, 711 (W.D. Tex. 1974).

Because there is no tying claim in this case, there is, and could be, no conflict between the decisions below and the decision of the Sixth Circuit in *Virtual Maintenance v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert.*

dismissed, 512 U.S. 1216 (1994).[10] *Virtual Maintenance* is a tying case with facts nearly identical to those of *Kodak*. As in *Kodak*, the issue in *Virtual Maintenance* involved derivative aftermarkets (for software updates and hardware maintenance) and a contention that lack of competition in the primary equipment market (for computers) made it impossible for a party to have market power in those aftermarkets. 11 F.3d at 665-67. But there are no derivative aftermarkets in this case, and the Eleventh Circuit correctly noted that Anheuser-Busch never contended that it lacked market power because of the presence of competition in some other market. Pet. App. 31.

The Sixth Circuit itself noted the important distinction between *Kodak*-type tying cases and cases involving vertical nonprice restraints when it distinguished a prior Sixth Circuit panel opinion on the grounds that it "involved vertical nonprice restraints unilaterally imposed by defendant Chrysler upon its distributors." 11 F.3d at 666. In short, there is no conflict between *Virtual Maintenance* and the Eleventh Circuit's opinion.[11]

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[10] That *Virtual Maintenance* has no relevance to this case is confirmed by the fact that petitioner did not even *cite Virtual Maintenance* in its appellate briefs below.

[11] Although Maris Distributing suggests that there is tension in the lower courts over the meaning of *Kodak* in tying cases (*see* Pet. 19 n.12), it is noteworthy that this Court has denied certiorari in many of those cases. *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998); *Virtual Maintenance v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1993), *cert. dismissed*, 512 U.S. 1216 (1994). Moreover, this case would hardly be an appropriate vehicle to resolve a tying issue that was not litigated, tried, or appealed.

II. The Eleventh Circuit Correctly Followed Applicable Precedents In Analyzing Market Power

There is no merit to petitioner's suggestion that the decision below is at odds with this Court's opinion in *Kodak* (*see* Pet. 15-17) and conflicts with the decision of the Fifth Circuit in *Spectators Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001) (*see* Pet. 19-22). Neither decision is applicable to a nonprice vertical restraint case or involves similar questions of law. No conflict exists.

A. *Kodak* Has No Applicability To The Market Power Inquiry In A Vertical Restraint Case

Contrary to petitioner's claim, the Eleventh Circuit's opinion is not at odds with *Kodak*. *See* Pet. 15-17. The petition suggests that Anheuser-Busch's share of the relevant market of ownership interests should include those independent distributors with whom Anheuser-Busch merely has a distribution contract. This argument is a warmed-over version of Maris Distributing's twice-rejected "imputed market power" theory – that Anheuser-Busch has market power in beer (an allegation that Maris Distributing never proved) and that this market power should be imputed to the market for ownership interests by virtue of Anheuser-Busch's contracts with its wholesalers. The Eleventh Circuit noted that neither Maris Distributing nor its experts were able to advance an economic reason why such imputation should be made. *See* Pet. App. 18. *Kodak* certainly provides no answer to that question because, as noted above, that case does not involve a tying claim. *Kodak* is therefore factually and legally inapposite.

As both the Eleventh Circuit and the district court correctly determined, in a nonprice vertical restraint case, the question of whether a manufacturer has market power is

determined by looking at its market share in the alleged relevant product market, not in some other market. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 38-39 (1977) (noting television manufacturer's market share in alleged relevant product market of television sets). Both the district court and the Eleventh Circuit found that Anheuser-Busch's market share of the relevant product market (less than 1%) and submarket (less than 3%) were far too small to support an inference of market power. Pet. App. 18-19. At trial, Maris Distributing's economic expert was unable to cite a single case in which a court had found market power with shares that small or to identify a single economist to agree with that conclusion. R76-221 to 222.

B. *Spectators' Communication* Is Inapposite

The Eleventh Circuit correctly ruled that *Spectators Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215 (5th Cir. 2001), was inapposite because it involved an alleged group boycott – *viz.* a collective horizontal restraint – as opposed to a nonprice vertical restraint unilaterally imposed by a manufacturer on its wholesalers. Pet. App. 20; *see also Spectators*, 253 F.3d at 223. In an effort to create a group boycott where there is none, Maris Distributing suggests that the public ownership provision is a "hub-and-spoke" conspiracy with "the same economic effect as a 'horizontal' agreement among distributors." Pet. 21. This theory, however, makes no economic or legal sense in the distribution context and would convert every vertical restraint case into a horizontal one. Indeed, the district court twice rejected Maris Distributing's argument that the public ownership provision was a horizontal restraint. R3-42-8 to 9; R6-104-5 to 7 & n.5. Those rulings were in accord with this Court's precedents, *see Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 & n.4 (1988), and were never appealed by Maris Distributing.

Even assuming that *Spectators' Communication* was factually on point with this case (which it is not), *Spectators' Communication* stands for the unremarkable proposition that a market power inquiry should focus on the market share of the relevant party in the relevant market. The district court dismissed antitrust claims against Anheuser-Busch in that case because it had no market power in the market for purchasing on-site advertising at PGA events. The Fifth Circuit reversed, noting the alleged product market was for the sale of such advertising and that the district court should have determined whether the PGA had market power in that market. 253 F.3d at 225. Applying *Spectators* to this case, the relevant inquiry is whether Anheuser-Busch had market power in the market for the purchase and sale of equity ownership interests in wholesale beer distributorships, precisely the inquiry undertaken by the district court and the Eleventh Circuit. Pet. App. 12-33.[12]

III. The Eleventh Circuit Did Not Create A "Contract Power" Exception to the Sherman Act

There is no basis whatsoever in the record or in the decision below for petitioner's contention that the Eleventh Circuit created a "contract power" exception to the Sherman Act. *See* Pet. 22-24. The petition does not cite a single page – or quote a single sentence – from the court's opinion to support the assertion. Indeed, the Eleventh Circuit said precisely the opposite: "[I]f the district court had held that Anheuser-Busch had not violated the antitrust laws simply because its actions were pursuant to a contract, that would have been incorrect. Anticompetitive actions are not immunized by virtue of being memorialized in a contract." Pet. App. 22.

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12 As a final matter, nothing in *Spectators* suggests that it is appropriate to ***aggregate*** market shares in a vertical restraint case.

Nor did the district court or the Eleventh Circuit ever conclude that Anheuser-Busch had "absolute control over output, prices, entry, and exit in a relevant market." Pet. 22. Significantly, petitioner provides no record citation for this claim either, other than a conclusory assertion that Anheuser-Busch "breach[ed] the contracts [with its wholesalers] and threaten[ed] bad faith terminations if distributors did not follow Busch's demands." *Id.* at 22 n.15. Yet the termination of Maris Distributing and other distributors was ***never*** a part of this case.[13] The district court ***excluded*** from evidence all documents and testimony offered by Maris Distributing that it and other distributors had been wrongfully terminated. R45-633-4 to 17; R69-141 to 148; R75-152 to 154; R85-43 to 47. Indeed, Maris Distributing acknowledges that it was precluded from presenting the very evidence on which it now seeks to rely. *Compare* Pet. 22 n.15 *with id.* at 9 n.3. Although petitioner unsuccessfully appealed the evidentiary rulings to the Eleventh Circuit (*see* Pet. App. 8-9 n.5) – it does not challenge those rulings here.[14]

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[13] On March 20, 1997, after this action had been filed, Anheuser-Busch terminated its Equity Agreement with petitioner on grounds that had nothing to do with the public ownership provision. *See, e.g.*, R64-173 to 174. The validity of that termination was litigated in a separate case in Florida state court.

[14] Petitioner's suggestion that the Eleventh Circuit created a "classic 'chicken-or-egg' dilemma" which will make it difficult to establish actual anticompetitive effects in cases like this one (*see* Pet. 11-12, 23) is inconsistent with its assertion below that it presented "abundant" evidence of actual effects. *See* Appellant's C.A. Br. 12, 19-21. Of course, the jury disagreed. R52-789. Accordingly, petitioner's dispute is not with the legal standard employed by the Eleventh Circuit but with the factual determination by the jury. Petitioner never challenged that finding below and does not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 02-872

In The

Supreme Court of the United States

MARIS DISTRIBUTING COMPANY,

Petitioner,

v.

ANHEUSER-BUSCH, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. MARIS is not Attempting to Argue an Unpled Tying Claim

BUSCH's Brief claims that MARIS is attempting to present a "newly minted tying claim" to this Court which has never been pled or litigated. MARIS has never argued that this case was pled as an illegal tying case. MARIS's Certiorari Petition references antitrust tying principles only in a single paragraph to illustrate a mechanism recognized by this Court through which a party may transfer its market power from one market to another. [Cert.Pet. at p. 25]. This was in response to the Eleventh Circuit's conclusion "that MARIS has not identified a valid economic reason why Anheuser-Busch's alleged market power in the beer market should create market power in the different market for the purchase and sale of equity interests in beer distributorships." [App. at p. 18].

MARIS does not argue that BUSCH's tying of the sale of its product to an agreement by distributors to give BUSCH control over the sale of beer distributorships is a per se illegal tying arrangement. MARIS merely argued that the tying arrangement is the mechanism through which BUSCH parlayed its market power in the beer market into market power in the relevant market and submarkets for beer distributorships. BUSCH's transfer of that market power from one market to another does not trigger an antitrust violation. The violation is triggered only because the public ownership prohibition at issue has

potential anticompetitive effects in the relevant market and submarket.[1]

II. BUSCH Distinguishes *Kodak* on Irrelevant Grounds

BUSCH argues that *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992) is "factually and legally inapposite" because *Kodak* involved an illegal tying claim. An initial and necessary aspect of *Kodak* was a determination of whether Kodak had market power in the tying market for replacement parts. This Court concluded that Kodak may have obtained market power in the replacement parts market through contractual prohibitions and "pressure" and that these contracts and pressure *"would be sufficient to entitle respondents to a trial on their claim of market power." Id.* at 465. It was only after this court concluded that Kodak might have market power in the tying market by virtue of its contracts and "pressure" that *Kodak* addressed the existence of an illegal tying of replacement parts to a different market. The Eleventh Circuit failed to follow *Kodak* by refusing to recognize that BUSCH could acquire market power in the market for beer distributorships through contracts and pressure through which it controlled distributorship sales.[2]

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[1] BUSCH's argument that MARIS never challenged BUSCH's "right of approval" of distributorship sales "as an antitrust violation" is misplaced. BUSCH's control over distributorship sales merely creates market power, not an antitrust violation.

[2] BUSCH's distinction of *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d. 660 (6th Cir. 1993), on the same ground is similarly irrelevant. In *Virtual Maintenance*, the court identified "an

(Continued on following page)

III. BUSCH Distinguishes *Spectators* on Irrelevant Points

BUSCH distinguishes *Spectators Communication Network, Inc. v. Colonial Country Club*, 253 F.3d. 215 (5th Cir. 2001), by maintaining that *Spectators* is "inapposite because it involved an alleged group boycott – *viz.* a collective horizontal restraint. . . . " [BUSCH Brief at p. 14]. In *Spectators*, the Fifth Circuit held that it was improper to dismiss an antitrust claim against one party to an anticompetitive agreement (or conspiracy) on the grounds that the party did not have market power where the combination of parties to the agreement had market power. BUSCH can draw no meaningful distinction between factors to consider in evaluating market power in this case as opposed to *Spectators*.

As in *Spectators*, BUSCH has secured an agreement from 700 other parties controlling a majority of the relevant market and the entire submarket to boycott public companies. As in *Spectators*, the nature of the market power to be examined in determining the anticompetitive nature of this boycott is the market power of all parties thereto. There is no distinction between a conspiracy to boycott and an agreement to boycott. BUSCH's equity agreement is a "hub and spoke" conspiracy to boycott

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exclusive distribution license" as the basis of the defendant's market power in the market for certain software support. *Virtual Maintenance*'s finding of market power from an "exclusive distribution license" cannot be reconciled with the Eleventh Circuit's rejection of market power arising from the exclusive distribution agreements between BUSCH and its distributors.

public companies from the relevant market and submarket.

Following *Spectators*, the relevant inquiry is the combined market power of all parties that have agreed to boycott public companies. If all beer distributors, absent BUSCH's participation, had agreed to bar public companies from participating in the relevant market, *Spectators* clearly would have required considering the combined market power of all participating distributors. If BUSCH then joined the agreement, its entry into the boycott would not create antitrust immunity or require a different analysis. A "hub and spoke" conspiracy with BUSCH at the hub orchestrating the boycott of public companies does not alter the economic impact of the parties' agreement or the reasoning in *Spectators*.

IV. BUSCH Misapprehends MARIS's References to Excluded Evidence

BUSCH correctly notes MARIS's statements in its Certiorari Petition that the trial court excluded evidence of BUSCH's detailed written plans for pressuring distributors to exit the market as well as evidence of BUSCH's market-wide activities in forcing market exits by wrongfully threatening distributors with termination and wrongfully terminating distributors. BUSCH then characterizes these matters as an improper attempt to challenge those evidentiary rulings. That argument confuses the issue.

The core issue raised in MARIS's Certiorari Petition arose from the trial court's entry of a directed verdict in favor of BUSCH on the issue of whether BUSCH had market power. The trial court and Eleventh Circuit ruled that a showing of market power had not been made, in

part, because MARIS relied on the powers that flowed to BUSCH from its 700 distributorship contracts to establish market power. The trial court also excluded evidence of BUSCH's termination threats, pressure, and termination of distributors on the ground that those matters related to contract power and not market power. That ruling was premised upon the same principle which led to the directed verdict – that contract power could not be used to establish market power. If the Eleventh Circuit's ruling that power related to 700 contracts which give a party control over an entire relevant submarket may not be used to establish market power is rejected, then both the directed verdict and exclusion of this evidence are improper. BUSCH's hypertechnical attempts to distinguish ramifications flowing from the same legal principle have no currency.

V. The Eleventh Circuit Created a Contract Power Exception to a Finding of Market Power Under the Sherman Act

BUSCH cites the Eleventh Circuit's disclaimer that "anticompetitive actions are not immunized by virtue of being memorialized in a contract" as a refutation of MARIS' argument that the Eleventh Circuit created a "contract power exception" to a finding of market power. [Brief at p. 15]. The Eleventh Circuit's statement was a reference to the obvious fact that Section I of the Sherman Act requires an "agreement" and that, therefore, the existence of an anticompetitive contract cannot possibly immunize a party from antitrust liability. That pronouncement means only that the Eleventh Circuit did not consider inclusion of the public ownership prohibition in BUSCH's distributorship agreements as a bar to BUSCH's

antitrust liability. There is no question, however, that the Eleventh Circuit held that power over a relevant market which arises in connection with a series of contracts cannot give rise to market power. MARIS fairly characterized that ruling as a "contract power exception."

VI. MARIS's Certiorari Petition Accurately States the Record

BUSCH argues the MARIS "takes enormous liberties with the record" and cites as an example MARIS's statement that BUSCH directed distributors regarding prices to charge retailers. BUSCH claims that "this issue was never part of the case at trial or the appellate level, and there certainly is no evidence in the record (or otherwise) that Anheuser-Busch directed its wholesalers to charge certain prices to retailers." [BUSCH Brief at p. 4]. BUSCH has overlooked significant portions of the record. For instance, Rudolph Maris testified that when BUSCH requested price increases, he "had to go along with the price increase otherwise I would be hounded or there would be repercussions." [Trial TR Sept. 27, 2000 at p. 105]. MARIS specifically stated its position at trial that BUSCH's ability to pressure small family owned distributors on pricing matters "relates to the anticompetitive effect, which is the ability of Anheuser-Busch to control prices by keeping the distributor under their influence." [Trial TR Sept. 27, 2000 at p. 108]. One of MARIS' economists specifically identified Rudolph MARIS' above cited testimony as evidence of harm to competition. [Trial TR

Oct. 19, 2000 at p. 152-154]. MARIS took no liberties with the record.[3]

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[3] BUSCH claims that MARIS inaccurately attempted to "create the impression that it bought the distributorship from Anheuser-Busch." BUSCH also alleges that MARIS's Petition inaccurately represents that there was a deal between Roger Maris and August Busch, Jr. connecting the MARIS family's acquisition of the distributorship to Roger Maris playing "an extra year of baseball." These claims are misguided. Rudolph Maris testified regarding a meeting with August Busch, Jr. he attended with his brother, Roger, in the 1967 baseball season wherein the Marises were offered their distributorship and Roger Maris was requested (and agreed) to "play one more year." [Trial TR Sept. 26, 2000 at p. 131]. The Marises then paid the Gainesville and Ocala distributor (who was awarded the Tampa territory) for his tangible assets and paid BUSCH for the inventory. [Trial TR Sept. 26, 2000 at p. 136-139]. It was only after MARIS acquired the distributorship that BUSCH implemented an Equity Agreement to encourage its distributors to invest in their markets by allowing them to build, sell, and bequeath equity. MARIS built its territory throughout the next 28 years from a rural outpost to one of the largest BUSCH distributors.